Supreme Court, U.S.
FILED
04-605 NOV 3 - 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MIGDIA CHINEA-VARELA,
AKA MIGDIA C. VARELA, PETITIONER

v.

CBS BROADCASTING INC.; COLUMBIA BROADCASTING SYSTEM, INC., A CALIFORNIA CORPORATION; WRITERS GUILD OF AMERICA, WEST, INC., A CALIFORNIA CORPORATION; FRANK PIERSON; JEFF SAGANSKY; CHARLES D. SEGARS; BRIAN WALTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an evidentiary standard required at the pleading stage to state a cause of action for employment discrimination, as the Ninth Circuit impliedly held in this case, or instead is the more liberal standard as set forth in cases such as *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002), still the law?

2. Does paying a Hispanic screenwriter approximately one-half of the amount that is paid to those of other national origins merely because one is of Hispanic national origin amount to discrimination?

3. Can it be discrimination to purportedly attempt to benefit a minority group, while providing discriminatory terms and/or benefits of employment to that minority member, as in paying a Hispanic screenwriter one-half the amount paid to non-Hispanic screenwriters, and does this fall on the permissible or impermissible side of the "line of demarcation between permissible and impermissible affirmative action plans," when she would have earned about double had she not been Hispanic?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Migdia Chinea-Varela, aka Migdia C. Varela, an individual, ("Ms. Varela").

Respondents: CBS Broadcasting Inc., a New York corporation, formerly known as CBS Inc., and believed to be an indirect wholly owned subsidiary of Viacom Inc., a publicly traded company; and Columbia Broadcasting System, Inc., a California corporation, (cumulatively referred to herein as "CBS").

Writers Guild of America, West, Inc., a California corporation, ("Guild").

Frank Pierson, an individual; Jeff Sagansky, an individual; Charles D. Segars, an individual; and Brian Walton, an individual, (cumulatively referred to herein as "Individual Defendants").

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MIGDIA CHINEA-VARELA, aka MIGDIA C. VARELA, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

On July 6, 1994, Ms. Varela filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), against both the Guild (in the caption of the charge) and CBS (in the body of the charge). Such filing also constituted Ms. Varela's Complaint of Discrimination with the California Department of Fair Employment and Housing ("DFEH"). [Appendix, p. 75a]. Thereafter, both the DFEH and then the EEOC issued notices of right to sue allowing suit in civil court. While there are two other Charges relevant to the underlying District Court proceeding, the February 21, 1995 Charge, at Appendix, p. 78a, and the June 23, 1995 Charge, at Appendix, p. 80a, this July 6, 1994 Charge, at Appendix, p. 75a, is the main Charge of relevance to this petition for certiorari. Those other two Charges contain additional allegations of different incidents of discrimination and retaliation, occurring after the incidents listed in the July 6, 1994 Charge.

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[1] Note: Upon filing tne appeal to the Ninth Circuit Court of Appeal, the Court of Appeal inadvertently reversed the order of the first two listed Respondents from that contained in the District Court and that in the prior appeal. In captioning this case for this Court, Petitioner has used the caption order used by the Court of Appeal in the appeal at issue.

On December 15, 1998, Screenwriter filed her initial Court Complaint for National Origin Discrimination and Retaliation, with the United States District Court for the Central District of California. After two amendments, a Second Amended Complaint was filed by Ms. Varela. Respondents filed various Motions to Dismiss, and the Court dismissed the entire action on May 25, 1999. [Appendix, p. 7a]. That first dismissal, was the subject of a prior appeal to the Ninth Circuit Court of Appeal, which was reversed and remanded in part on February 15, 2001. [Appendix, p. 9a]. The first appeal's decision was not published, but has an unofficial citation of *Chinea-Varela v. Columbia Broadcasting Systems, Inc.*, 4 Fed.Appx. 404, 2001 WL 137246 (9th Cir. 2001). [Appendix, p. 9a].

On June 20, 2001, after this prior appeal and partial reversal, Ms. Varela filed her Third Amended Complaint, which included two causes of action: 1) National origin discrimination and harassment under *Title VII* and the *FEHA* against both CBS and the WGA, and 2) Retaliation under the *FEHA* against all defendants, including the individual defendants, and under *Title VII* against CBS and the WGA. [Appendix, p. 36a].

Respondents filed Motions to Dismiss. On November 5, 2001, the District Court dismissed the Third Amended Complaint, except as to those allegations related to ¶¶43(e) and 43(f) relating to two retaliation claims, and further did not provide leave to amend as to the remainder. [Appendix, p. 13a]. While the main claims against CBS were dismissed out of the case, and while the Guild and all of the Individual Defendants were also dismissed out of the case, these

matters were not appealable at the time of the November 5, 2001 dismissals of them because two claims remained against CBS at that time. An order granting only in part a motion to dismiss is not a final order, and not immediately appealable, whether with or without prejudice. Further, an order granting a motion to dismiss as to only certain parties is not final either, nor immediately appealable. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 Fed.2d 1369, 1370-1371, fn. 2 (10th Cir. 1979); *Chacon v. Babcock* , 640 Fed.2d 221, 222 (9th Cir. 1981) (order less than all claims/parties not final). Appeal of such orders may proceed upon adjudication of remaining claims or certification. *FRCP* 54(b). Upon final judgment on the remaining two CBS claims, (see below), these other claims against CBS as well as the Guild and the Individual Defendants, likewise became appealable. See *Munoz v. Small Business Administration*, 644 Fed.2d 1361, 1364 (9th Cir 1981) (court dismissed one defendant, four years later dismissed action to all defendants, both dismissals reviewable on final judgment). Note also that the order specifically provided that discovery was limited solely to the two remaining claims. [Appendix, p. 14a, ¶2, last sentence].

Thereafter, on November 19, 2001, CBS filed an Answer to the remaining portions of the Complaint, and later on September 17, 2002, another Motion to Dismiss the remainder of the Complaint. However, on October 2, 2002, because that Motion contained evidentiary matter, the District Court converted the matter to a Motion for Summary Judgment and rescheduled the hearing. [Appendix, p. 15a]. CBS then filed a second Motion for Summary Judgment as to administrative remedy satisfaction. On December 12,

2002, the District Court, granted one of the two Motions for Summary Judgment. [Appendix, p. 18a]. The District Court further made a statement of uncontroverted facts. [Appendix, p. 20a]. However, note that these findings in the statement of uncontroverted facts did not make any findings as to the claims the District Court dismissed previously, i.e., those other claims dismissed on November 5, 2001. The Court did not make any findings as to the July 6, 1994 EEOC Charge, which covered the allegations of discrimination from November 22, 1993. [Charge at Appendix, p. 75a]. In this regard, note that the findings (e.g., ¶11, Appendix, p. 30a), do *not* refer to the original July 6, 1994 Charge, which covered November 22, 1993, but instead cover the later charge and the later events, e.g., August 12, 1994, not subject of the July 6, 1994 Charge.

Then, on December 17, 2002, final Judgment was entered as to all claims. [Appendix, p. 82a]. Ms. Varela then timely filed her appeal to the Circuit Court of Appeals appeal within 30-days on January 16, 2003, which appeal included the November 5, 2001 dismissal of the discrimination claims. In such cases, the losing party can, as here, seek review of both the judgment and all earlier nonfinal orders and rulings that produced the judgment. These earlier, interlocutory decisions are said to have "merged" into the final judgment. *Munoz v. Small Business Administration*, 644 Fed.2d 1361, 1364 (9th Cir 1981). In that appeal to the Circuit Court of Appeals, Ms. Varela appealed both the later claims dismissed on December 12, 2002, as well as those prior claims dismissed on November 5, 2001. This petition for certiorari seeks review of those claims dismissed on November 5, 2001, but were not

appealable until the final judgment of December 17, 2002.

On June 25, 2004, the Court of Appeals filed a decision on this case affirming the District Court decision, which disregarded the different standard for ruling on the discrimination claims that were dismissed on the original Motions to Dismiss. [Appendix, p. 1a]. This decision at issue here was not published, but has an unofficial citation of *Chinea-Varela v. CBS Broadcasting Inc.*, 104 Fed. Appx. 619, 2004 U.S. App. LEXIS 13276 (9th Cir. 2004). [Appendix, p. 1a].

On July 9, 2004, Ms. Varela timely filed a Petition for Rehearing including a suggestion for Rehearing *En Banc*, in order to point out this error. [Appendix, p. 85a]. However, on August 5, 2004, the Petition for Rehearing was denied by Order of the Court of Appeal. [Appendix, p. 34a].

JURISDICTION

The date of the judgment or order sought to be reviewed was entered on June 25, 2004. [Appendix, p. 1a]. Ms. Varela timely filed a petition for rehearing on July 9, 2004. [Appendix, p. 85a]. *FRAP* 40 provides that a petition for rehearing is timely if filed within 14 days of the date of the decision; therefore the petition for rehearing was timely. A petition for rehearing was denied on August 5, 2004. [Appendix, p. 34a]. According to *Supreme Court Rule* 13.1 and 13.3, a petition is timely if it is filed within 90 days of the "date of the denial of the petition for rehearing." Therefore, this petition is timely.

This court has jurisdiction to review this matter on a writ of certiorari as the *judgment* or order in question under 28 *U.S.C.* §1254. Court of Appeals cases are reviewable by writ of certiorari granted on the petition of any party. Jurisdiction was previously conferred upon the Court of Appeals by *FRAP* 3 and 4, and 28 *U.S.C.* §1291 regarding review of final decisions. Said Judgment appealed was filed December 12, 2002, and entered December 17, 2002. [Appendix, p. 82a].

Further, jurisdiction was previously conferred on the District Court, as provided for by the Constitution of the United States and its laws including under the provisions of Title VII, 42 *U.S.C.* §2000e et seq., including §§2000e, 2000e-2, 2000e-3 and 2000e-5, as well as under the general federal question jurisdiction provisions of 28 *U.S.C.* §1331, as each amended, to redress and enjoin discriminatory and retaliatory employment practices, including in hiring.

RELEVANT STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved, 42 *U.S.C.* §2000e, 42 *U.S.C.* §2000e-2, California *Government Code* §12926 and California *Government Code* §12940 are attached hereto at Appendix, p. 105a.

STATEMENT OF CASE

Ms. Varela is a Hispanic screenwriter. This case arose out of CBS and the Guild's program requiring Hispanic professional screenwriters to be paid *less than*

one-half what non-Hispanic screenwriters were paid, and out of Ms. Varela's complaints that the program was discriminatory against Hispanics.

CBS does not have a formal application process for writers. [Third Amended Complaint ("TAC"), ¶25; Appendix, p. 49a]. Prior to Half-Pay Program, Ms. Varela, and certain other experienced Hispanic writers, managed to pitch their stories directly to various studios. [TAC, ¶26; Appendix, p. 49a]. After program started, if Ms. Varela and other Hispanic professional writers wished to seek staff-writing assignment or special-writing project, they were required to apply through and participate in this Half-Pay Program, which paid less than 50% of what full time positions paid to non-Hispanic professional writers. [TAC, ¶27; Appendix, p. 49a].

The main Charge against CBS, as well as the Guild, regarding the Half-Pay Discrimination Program is the "First Charge," i.e., that Charge filed on or about July 6, 1994, and attached to the Third Amended Complaint as Exhibit "A." [Appendix, p. 75a]. This is the Charge that is relevant to the discriminatory Half-Pay Program. [See Third Amended Complaint, ¶33.a.; Appendix, p. 55a]. A lawsuit is not limited to those facts in the charge. *Oubichon v. Northern Am. Rockwell Corp.*, 482 F.2d. 569, 571 (9th Cir. 1973); *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1121 (1989) (adopting standard for *FEHA* claims). "[P]ermissible scope of the civil action [is the same as] the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730 (9th

Cir. 1984). [TAC, ¶30; Appendix, p. 51a]. Each of Screenwriter's claims are reasonably related to and within the scope of both the First Charge [Exhibit "A" to TAC; Appendix, p. 75a], as well as being the type of information that would be usually encompassed and within the scope of an EEOC investigation. CBS is listed within the caption or the body of the original July 6, 1994 EEOC Charge, i.e., the First Charge. In this regard while the Guild was listed as the "main" party being charged, CBS is listed below as additional party who had discriminated against Ms. Varela. [Appendix, p. 76a, ¶I.a.]. CBS is clearly within "scope" of the original July 6, 1994 EEOC Charge, i.e., the First Charge, and deemed to have been satisfied within the EEOC's administrative remedies satisfaction requirement. Therefore, Ms. Varela has exhausted her administrative remedies as to CBS in light of this. In *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1352 (9th Cir. 1984), stated, citing *Chung v. Pomona Valley Community Hospital*, 667 F.2d 788, 792 (9th Cir. 1982), that "Title VII charges can be brought against persons not named in an E.E.O.C. complaint as long as they were involved in the acts giving rise to the E.E.O.C. claims." Further, in *Martin v. Fisher* (1992) 11 Cal. App. 4th 118, 119-123, the Court held that as to a defendant, a plaintiff had exhausted his administrative remedies and could therefore sue such defendant who had named such defendant in the body of the Plaintiff-Appellant's DFEH Charge, but not in the caption of the document, nor in the Right-To-Sue Letter. See also *Saavedra v. Orange County Consolidated Transportation etc. Agency*, 11 Cal. App. 4th 824, 826-828 (1992), holding that a defendant not delineated as the offending party, but described in the body of the administrative charge was properly the

subject of a civil lawsuit. See also *Cole v. Antelope Valley Union High School District*, 47 Cal.App.4th 1505 (1996), which held that Defendants that had been named in the caption or body of the DFEH Charge were allowed to bring a civil lawsuit under the FEHA.

Title VII prohibits covered entities from discriminating against a protected individual because of her race, color, religion, sex or national origin. [42 *USC* §2000e-2(a)-(d)]. Likewise, the *Fair Employment and Housing Act ("FEHA"), California Government Code* §12900, et seq., prohibits an employer from taking any adverse action against a protected individual based upon these factors, as well as certain additional factors, including "ancestry." [See *California Government Code* §§12926(j), 12940(a)]. Ms. Varela's national origin of Hispanic is clearly a protected category under both statutes. Ms. Varela is of "Hispanic national origin." [TAC, ¶8; Appendix, p. 42a]. This constitutes Ms. Varela's membership in a protected class.

The following conduct relating to the terms and conditions of employment are unlawful: failing or refusing to hire, failing or refusing to refer for employment; discharging; or "*otherwise discriminating* with respect to compensation, terms, conditions, or privileges of employment." [42 *USC* §2000e-2(a)(1)]. In a similar manner, the following actions, if taken because of a protected characteristic, will constitute an unlawful employment practice: refusing to hire or employ; refusing to select for a training program leading to employment; discharging from employment or from a training program leading toe employment; *discriminating in compensation or terms, conditions or privileges of employment.* [*California Government*

Code §12940(a)].

The primary allegations related to the half-pay program in the Third Amended Complaint is contained in paragraph 33, including subparagraph 33.a., [Appendix, p. 55a], which states that:

> "33. Plaintiff sought out and applied for writing assignments, both staff writing positions as well as for special writing assignments, with Defendant CBS, at all times relevant to this Complaint, including, but not limited to the following:
>
> a."On or about June 18, 1993, through and including December 1993, Plaintiff applied for both staff writing positions as well as for special writing assignments with Defendant CBS, but the Defendant CBS did not act on said applications until on or about November 22, 1993, at which time the Defendant CBS refused to hire Plaintiff at the full salary and benefits, but instead, on or about November 22, 1993, steered and channeled Plaintiff's application into the Hispanic Half-Pay Program, and offered the Plaintiff a writing position paying approximately one-half the union wage scale, based solely on the fact that the Plaintiff was a Hispanic. Plaintiff continued to contact the Defendant CBS through on or about December 1993, and beyond, in furtherance of her applications for a staff writing position and special writing

assignments. Based in part on this incident, the Plaintiff filed her First Charge."

Further, paragraph 15, [Appendix, p. 45a], states:

"Plaintiff is informed and believes and based on such information and belief, Plaintiff alleges that Hispanics as a class have been adversely affected by the Half Pay Program by allowing signatories to the MBA to hire professional writers for half the relevant minimum if they claim to be Hispanic, herein referred to as the "Half-Pay Program." Whether by intent, design or practice, even if the Half-Pay Program was originally conceived only for inexperienced non-members of the WGA, in practice, operation and application the Half-Pay Program forced all, or nearly all, Hispanics, including the Plaintiff, to either apply through or have their applications channeled through the Half-Pay Program. Said discrimination was largely carried out by the WGA and CBS referring and channeling anyone with a Hispanic surname, such as the Plaintiff's surname "Varela," to have their application considered through said Half-Pay Program. All, or most, Hispanic writers were no longer permitted by the WGA and CBS to apply through the normal channels of application."

It is clear that based upon these allegations, as well as the complementary allegations contained in paragraphs 26, 27, 35, 36 and 37, [Appendix, p. 49a, p. 57a, p. 58a], among others, that Ms. Varela has properly plead a case of discrimination based upon this half-pay for Hispanics program, and suffered discrimination in terms of employment.

In general, plaintiffs may attempt to prove the connection between an adverse action and their protected characteristic through one of two theories: disparate treatment or disparate impact. "Disparate treatment" is *intentional* discrimination against one or more persons on prohibited grounds; i.e., treating similarly situated individuals differently in their employment *because of* a protected characteristic. [*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854, fn. 15 (1977); *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 355, 100 Cal.Rptr.2d 352, 378, fn. 20 (2000). There are two different methods of proving intentional discrimination: direct evidence; and indirect or circumstantial evidence, invoking the *McDonnell Douglas* analysis. "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." [*Godwin v. Hunt Wesson, Inc.*, 150 Fed.3d 1217, 1221 (9th Cir. 1998) (brackets in original; internal quotes omitted)]. In most cases, there is no direct evidence of discrimination by the employer; therefore, discrimination claims must be proved indirectly, i.e., circumstantially. To this end, discrimination claims *at trial* are analyzed under an allocation of the burdens of production and proof that subjects such claims to an increasing narrow focus. *At trial*, first, plaintiff must establish a *prima facie case* of

discrimination; the burden of production then shifts to the employer to respond with a *legitimate, nondiscriminatory reason* for its actions; and, then, the burden shifts back to plaintiff to establish that the employer's articulated reason was a "pretext" or cover-up for unlawful discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-1825 (1973).

Additionally, *Title VII* violations may also be proved by the "disparate impact" theory; i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no relationship to job requirements, in fact had a disproportionate adverse impact on members of a protected class. [*International Brotherhood of Teamsters*, supra; *Guz*, supra]. However, as stated these burden of proof requirements are for trial, or at least at summary judgment. In Ms. Varela's case before the District Court, her discrimination claims (as opposed to the two retaliation claims that remained) never made it past the pleading stage because the District Court improperly required such an evidentiary trial burden of proof at the pleading stage. However, case law in this Court and in other Circuits clearly does not so require this level of proof at the pleading stage. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002); See also *Sparrow v. United Air Lines, Inc.* 216 F.3d 1111, 1114 (DC Cir. 2000).

Therefore, this Court should utilize its supervisory powers over the courts of appeal in order to hold the Ninth Circuit Court of Appeals accountable to following the precedent of this Court, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct.

992 (2002), and other circuit cases in agreement and conformity with this Court's holdings, e.g., *Sparrow v. United Air Lines, Inc.* 216 F.3d 1111, 1114 (DC Cir. 2000).

The Ninth Circuit's panel Decision in this matter, with regard to the discrimination claim stated its decision in one single paragraph, at Appendix, p. 4a, first full paragraph:

> "Varela alleged that an affirmative action trainee program that WGA negotiated and that CBS executed from 1993 to 1995 discriminated against Hispanic writers on the basis of their national origin. We agree with the district court that Varela entirely failed to demonstrate how the program had a disparate impact on Hispanic scriptwriters, or how it resulted in Varela's being discriminated against in consideration for regular staff writing positions at CBS. *See Atonio v. Wards Cove Packing Co., Inc.*, 275 F.3d 797, 800-02 (9th Cir. 2001); *Gay v. Waiters' and Daily Lunchmen's Union, Local No. 30*, 694 F.12d 531, 537-38 (9th Cir. 1982)."

The issues raised in this petition were not only raised in the trial court and to the Court of Appeal for the Ninth Circuit, but were also pointed out in the Petition for Rehearing to the Court of Appeal. [Appendix, p. 85a].

REASONS FOR GRANTING THE PETITION

Ms. Varela seeks certiorari review by this Court of the June 25, 2004 Ninth Circuit Court of Appeal Panel decision (McKeown, J., Bybee, J., and Breyer, District Judge sitting by designation), [Appendix, p. 1a], of which Ms. Varela timely sought rehearing review in the Court of Appeal before filing this Petition, [Appendix, p. 85a]. The considerations and factors in determining whether to grant certiorari are set forth in *Supreme Court Rule* 10, which will be discussed in the following sections.

A. This Court Should Grant Certiorari to Amplify and Clarify the Pleading Requirements in Discrimination Cases, and to Use this Court's Supervisory Power's to Have the Ninth Circuit Panel Follow Relevant Precedent, Because the Ninth Circuit Panel Decision in this Case Improperly Uses an Evidentiary Standard to Judge the Sufficiency of the Discrimination Claims Pleading, and Instead Improperly Places an Unduly High Burden on the Plaintiff to Prove Her Case at the Pleading Stage.

The Circuit Panel utilized the wrong legal standard in upholding the District Court, when the Panel in effect treated these issues as having been dismissed at trial or summary judgment, when in fact they were dismissed at the pleading stage. In doing so, this also creates an apparent conflict with *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002), which standards for pleading discrimination claims

contradicts those evidentiary standards for the order of proof in *Atonio v. Wards Cove Packing Co., Inc.*, 275 F.3d 797, 800-02 (9th Cir. 2001), and *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 537-38 (9th Cir. 1982), improperly used by the Panel for this pleading sufficiency determination.

Certiorari review is necessary because the Ninth Circuit Court of Appeal's Decision overlooks established law on the standards for pleading a discrimination claim, and directly conflicts with decisions of other Circuits and this Court on this issue of importance. The Panel's Decision impairs the effectiveness of *Title VII* in remedying discrimination in the workplace by its utilizing the standards for proof at trial, on a pleading issue. Further, the Panel's Decision contravenes the well-settled principles of pleading discrimination claims, and requires a level of proof at the time of pleading that is clearly not required. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002), and *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (DC Cir. 2000). Because the Panel's Decision conflicts with these decisions, review is necessary to secure or maintain uniformity of the Court's decisions with not only other Circuits but this Court's precedential decisions. Further, another ground is that the determination of pleading standards for *Title VII* discrimination cases is a question of exceptional importance, in that removing the vestiges of discrimination is an important objective of national importance. This affects of rule of National application in which there is an overriding need for National uniformity.

The Ninth Circuit's panel Decision in this matter, with regard to the discrimination claim, cited in its decision, at Appendix, p. 4a, first full paragraph, to *Atonio v. Wards Cove Packing Co., Inc.*, 275 F.3d 797, 800-02 (9th Cir. 2001), and *Gay v. Waiters' and Daily Lunchmen's Union, Local No. 30*, 694 F.12d 531, 537-38 (9th Cir. 1982). Both of these citations are not proper authority for the discrimination claims because Ms. Varela's claims were dismissed on a pleading motion to dismiss, not at the time of the summary judgment motion. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 2001) 275 F.3d 797, 800-02, (disparate impact case), does not apply the proper standards for pleading a case. *Atonio* was based upon a bench trial. Note that in *Atonio*, the Court states that "It is the district court's determination on those issues, based on the record made at the bench trial, that we now review." Likewise, with regard to *Gay v. Waiters' and Daily Lunchmen's Union, Local No. 30* (9th Cir. 1982) 694 F.12d 531, 537-38, this was based upon a review of evidence at trial. Note that *Gay*, 694 F.2d at 534, refers to "The remaining claims were tried before the district court in October of 1979," and at 536, refers to the fact that "The waiters appeal the district court's judgment only with respect to their claims arising under 42 U.S.C. § 1981," i.e., the "remaining claims." Not only is the *Gay* Court not ruling on a *Title VII* claim, but instead a §1981 claim, this claim was determined at trial, too. Therefore, neither *Atonio* nor *Gay* are authority for the standards of pleading a claim in a Complaint, in that they both involve claims that proceeded to trial.

However, the rules governing pleading employment claims in federal courts are the same as in

civil actions generally. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) ("the ordinary rules for assessing the sufficiency of a complaint apply")]. The basic requirement is only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, to survive a *FRCP* 12(b)(6) motion, a *Title VII* plaintiff *need not* allege every element of a *prima facie* case of discrimination. The complaint need only set forth facts sufficient to *put defendants on notice* of the nature of the claims against them. These simplified notice pleading standards rely on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. *FRCP* 8(c); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 998 (2002).

In this regard, a race discrimination plaintiff need not set forth the elements of a *prima facie* case at the pleading stage. Thus, "I was turned down for a job because of my race" was held to be a sufficient statement of a claim upon which relief may be granted. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (DC Cir. 2000). Also, with respect to national origin discrimination claims, allegations that the employee is of one national origin (e.g., Hungarian), and that others at his place of employment are of another national origin (e.g., French), and that he was terminated because of his national origin stated a claim for national origin discrimination in violation of *Title VII*. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 999 (2002). Similarly, with respect to ethnic origin discrimination, allegations that an employer required an employee, because of his national origin (e.g., Mexican-American origin), to comply with different

terms and conditions of employment than it required of those of other national origins (e.g., non-Mexican-American co-workers), was held an adequate statement of a *Title VII* disparate treatment claim. [*Ortez v. Washington County, State of Oregon*, 88 F.3d 804, 808 (9th Cir. 1996). So, the Ninth Circuit in the decision at issue is requiring more for Ms. Varela, than not only other Circuits require, or this Court requires, but also what it previously required on another case prior to *Swierkiewicz*.

These three cases, i.e., *Sparrow, Swierkiewicz* and *Ortez*, one of which is an Ninth Circuit case and another one is a U.S. Supreme Court case, clearly show that the allegations of discrimination in this case were sufficient and the Court's dismissal of them on the motion to dismiss to be erroneous, in that the Ninth Circuit Panels's statement of the law was incorrect.

As such, the panel's decision in this case, utilizing the cases of *Atonio* and *Gay*, creates not only a conflict between two Ninth Circuit Court of Appeals cases, but also more importantly conflicts with the controlling U.S. Supreme Court authority and creates a conflict with another Circuit Court. Ms. Varela therefore requests that this Court grant certiorari review in order to notify the Courts of Appeal, in particular, the Ninth Circuit, that the *Swierkiewicz* means what it says, and is still controlling law.

Supreme Court Rule 10 provides several grounds to grant certiorari on this case based upon these issues. First, *Supreme Court Rule* 10(a), provides, in relevant part, that certiorari can be granted when "a United States court of appeals has

entered a decision in conflict with the decision of another United States court of appeals on the same important matter." In this regard, the Ninth Circuit Court of Appeals decision in our case here conflicts with *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (DC Cir. 2000). Second, *Supreme Court Rule* 10(c), also provides, in relevant part, that certiorari can be granted when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." In this regard, the Ninth Circuit decision in this case conflicts with *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 999 (2002). Third, grounds for certiorari in our case can also be found in *Supreme Court Rule* 10(a), which also provides, in relevant part, that certiorari can be granted "when a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," in part in that it failed to apply clear law conflicting with decision, even after having pointed it out in a Petition for Rehearing, which was denied without comment. [Appendix, p. 85a, and p. 34a].

Therefore, Ms. Varela requests this Court grant Petition for Certiorari. Further, in the event that the Court does not deem full review necessary or warranted, Ms. Varela suggests that this Court grant this Petition for Writ of Certiorari with a Summary Disposition of vacating the Judgment and remanding the case to the Court of Appeal for the Ninth Circuit for further consideration in light of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002).

B. This Court Should Accept Certiorari to Determine Whether Paying Half-pay to a Minority, Such as a Hispanic Screenwriter, Is Discriminatory, and Whether Claims That it Amounts to Affirmative Action Paradoxically Prevents a Lawsuit for Discrimination.

In addition to the fact that the controlling law for pleading discrimination claims has a relatively easy pleading requirement under *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 999 (2002), Ms. Varela has properly plead the specifics of a discrimination claim. In this regard, paying screenwriters, such as Ms. Varela, about one-half of what non-Hispanics were paid, because she was Hispanic, as reflected in her last name, creates another issue this Court should accept review to address. That issue is whether the Half-Pay for Hispanics Program was discriminatory, and whether it can be discrimination to purportedly attempt to benefit a minority group, while providing discriminatory terms and/or benefits of employment to that minority member.

Paying Hispanics half the amount paid to non-Hispanics, solely based upon the fact that they are Hispanic, amounts to discrimination. Respondents' attempt to now label such a program as an affirmative action program should be of no import. While bona fide affirmative action plans may in certain contexts be allowed under Civil Rights laws, merely calling a program affirmative action does not make it a bona fide affirmative action program, as here, where the program is blatantly discriminatory on its face against those it purports to benefit and has an adverse impact on the

protected class that it is allegedly created to benefit. This Court long ago, in *United Steelworkers v. Weber* (1979) 443 U.S. 193, 204, 99 S. Ct. 2721, 61 L.Ed.2d 480, emphasis added, held:

> "Title VII's prohibition in §§703(a) and (d) against racial discrimination **does not condemn *all*** private, voluntary, race-conscious affirmative action plans. . . **We need not today define in detail the line of demarcation between permissible *and impermissible affirmative action plans.* It suffices to hold that the challenged** Kaiser-USWA **affirmative action plan falls on the permissible side of the line.** . . [footnote 8] This is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII."

This suggests some purported "affirmative action" plans would violate *Title VII.* Merely calling a program "affirmative action" does not make it immune from Constitutional and *Title VII* Civil Rights protections. As set forth above, Ms. Varela, a minority (i.e., Hispanic) screenwriter alleged she was restricted from applying for a writing assignment outside the program, that she *did attempt* to apply for writing assignments through the normal channels but was not accepted by the Guild nor CBS and that she was *required* to go through the half-pay program. Paying half the amount for an employee without lawful reason

is discrimination even if Defendants contend it to be an affirmative action program.

This Court should accept certiorari on this case to further the "line of demarcation between permissible and impermissible affirmative action plans." Does paying a Hispanic screenwriter one-half the amount paid to a non-Hispanic screenwriter fall on the permissible or impermissible side of this line, if as in Ms. Varela's case, she was offered one-half of what she would have been offered had she not been Hispanic.

Supreme Court Rule 10(c), in part, permits review when a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Ms. Varela respectfully requests that this Court accept certiorari on this case to determine this important issue of whether half-pay for Hispanic screenwriters is discriminatory. Further, grounds for certiorari in our case can also be found in *Supreme Court Rule* 10(a), which also provides, in relevant part, that certiorari can be granted "when a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." In this regard, the District Court procedurally handled the case in a manner that the most important issue in the case, i.e., the half-pay for Hispanic screenwriters issue, was removed early from the case without discovery, and the Court of Appeals sanctioned this result by then utilizing the wrong legal standard upon analyzing its dismissal.

CONCLUSION

THEREFORE, Petitioner MIGDIA CHINEA-VARELA, aka MIGDIA C. VARELA, requests of this Court that it GRANT this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Further, in the event that the Court does not deem full review necessary or warranted, the Petitioner suggests that this Court GRANT this Petition for Writ of Certiorari with a Summary Disposition of vacating the Judgment and remanding the case to the Court of Appeal for the Ninth Circuit for further consideration in light of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002).

RESPECTFULLY SUBMITTED,

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(Any footnotes trail end of each document)

No. 03-55106, No. 03-55225

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGDIA CHINEA-VARELA, a/k/a Migdia C. Varela,
Plaintiff - Appellant,

v.

CBS BROADCASTING INC.; et al.,
Defendants - Appellees.

MIGDIA CHINEA-VARELA, a/k/a Migdia C. Varela,
Plaintiff - Appellee,

v.

CBS BROADCASTING INC.; et al.,
Defendants - Appellants,

and,

WRITERS GUILD OF AMERICA, WEST, INC.,
a California corporation; et al.,
Defendants.

May 12, 2004, Argued and Submitted,
Pasadena, California
June 25, 2004, Filed

COUNSEL: For MIGDIA CHINEA-VARELA, a/k/a Migdia C. Varela, Plaintiff - Appellant (03-55106): Scott D. Myer, Esq., MYER LAW FIRM, Beverly Hills, CA.

For CBS BROADCASTING INC., COLUMBIA BROADCASTING SYSTEM, INC., JEFF SAGANSKY, CHARLES D. SEGARS, Defendants - Appellees (03-55106): Henry Shields, Jr., Esq., IRELL & MANELLA, LLP, Los Angeles, CA.

For COLUMBIA BROADCASTING SYSTEM, INC., JEFF SAGANSKY, CHARLES D. SEGARS, Defendants - Appellees (03-55106): Kevin T. Baine, Washington, DC.

For WRITERS GUILD OF AMERICA, WEST, INC., FRANK PIERSON, BRIAN WALTON, Defendants - Appellees (03-55106): Anthony R. Segall, Esq., ROTHNER, SEGALL & GREENSTONE, Pasadena, CA.

For MIGDIA CHINEA-VARELA, a/k/a Migdia C. Varela, Plaintiff - Appellee (03-55225): Scott D. Myer, Esq., MYER LAW FIRM, Beverly Hills, CA.

For CBS BROADCASTING INC., Defendant - Appellant (03-55225): Kevin T. Blaine, WILLIAMS & CONNOLLY, Washington, DC.

For CBS BROADCASTING INC., COLUMBIA BROADCASTING SYSTEM, INC., Defendants - Appellants (03-55225): Henry Shields, Jr., Esq., IRELL & MANELLA, LLP, Los Angeles, CA.

For COLUMBIA BROADCASTING SYSTEM, INC., Defendant - Appellant (03-55225): Kevin T. Baine, Washington, DC.

For FRANK PIERSON, BRIAN WALTON, Defendants (03-55225): Anthony R. Segall, Esq., ROTHNER, SEGALL & GREENSTONE, Pasadena, CA.

For JEFF SAGANSKY, Defendant (03-55225): Kevin T. Baine, Washington, DC.

For JEFF SAGANSKY, Defendant (03-55225): Henry Shields, Jr., Esq., IRELL & MANELLA, LLP, Los Angeles, CA.

JUDGES: Before: McKEOWN, BYBEE, Circuit Judges, and BREYER, District Judge. **

OPINION: MEMORANDUM *

Migdia Chinea-Varela filed discrimination, retaliation, and harassment claims against CBS Broadcasting, Inc. (CBS), Writers Guild of America (WGA), and named defendants Frank Pierson, Brian Walton, Jeff Sagansky, and Charles Segars pursuant to Title VII, 42 U.S.C. § 2000e et seq., and the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12940, et seq. This is Varela's second appeal to this court. A panel of this court agreed with the district court that her complaint was "verbose, lengthy and convoluted," in dereliction of Fed. R. Civ. P. 8(a) and Fed. R. Civ. P. 8(e)(1), but remanded so that Varela could amend her complaint. *See* Chinea-Varela v. Columbia Broadcasting Systems, Inc., 4 Fed. Appx.

404, 405-6 (9th Cir. 2001). On remand, the district court dismissed with prejudice Varela's third amended complaint for all of her claims against WGA and the named defendants. The district court also dismissed all of Varela's claims against CBS except for her retaliation claim. With respect to that claim, the district court granted summary judgment.

Varela alleged that an affirmative action trainee program that WGA negotiated and that CBS executed from 1993 to 1995 discriminated against Hispanic writers on the basis of their national origin. We agree with the district court that Varela entirely failed to demonstrate how the program had a disparate impact on Hispanic scriptwriters, or how it resulted in Varela's being discriminated against in consideration for regular staff writing positions at CBS. *See* Atonio v. Wards Cove Packing Co., Inc., 275 F.3d 797, 800-02 (9th Cir. 2001); Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 537-38 (9th Cir. 1982).

Varela also alleged that the defendants retaliated against her when she voiced her objections to the affirmative action program. Varela failed to demonstrate how WGA or any of the named defendants retaliated against her where none of them took (or indeed, even could take) adverse employment action against her. The district court properly dismissed these claims. Neither did Varela show, with respect to CBS, that she was rejected for any specific writing positions for which she was qualified at CBS, or that producer Frank Dawson's comment that Varela was labeled a "trouble-maker," was predicated on any adverse employment action taken by CBS. *See* Lyons v. England, 307 F.3d 1092, 1118 (9th Cir. 2002). Similarly,

Varela failed to demonstrate that Craig Anderson Productions was in any way affiliated with CBS, or that the production company refused to hire Varela at the direction of CBS. *See* Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1214 (9th Cir. 1989). The district court properly granted summary judgment on this claim.

Varela claimed that the WGA harassed her based on the use of derogatory epithets that were posted on a computer bulletin board system. We affirm the district court's decision to dismiss this claim. The allegedly harassing messages were not pervasive or severe, did not occur in the workplace, were not sent by Varela's employers, supervisors, or colleagues, and did not alter the conditions of Varela's employment or create an abusive working environment. *See* Harris v. Forklift Systems Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). Varela's allegation that CBS harassed her was also properly dismissed because the facts in the record do not support the claim.

We also affirm the district court's denials of Varela's motions to disqualify Judge Letts, to certify a class action, and for leave to amend her complaint. Finally, we do not reach CBS's cross-appeal on administrative exhaustion because we conclude that the district court's judgment dismissed all of Varela's claims. The judgment is AFFIRMED.

Footnotes

** The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Case No. CV 98-10064 JSL (AJWx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGDIA CHINEA-VARELA,
aka MIGDIA C. VARELA,
Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a California corporation; CBS BROADCASTING INC., a New York corporation, formerly known as CBS, INC.; WRITERS GUILD OF AMERICA, WEST INC., a California corporation; FRANK PIERSON, an individual; JEFF SAGANSKY, an individual; CHARLES D. SEGARS, an individual; BRIAN WALTON, an individual; and DOES 1 through 10, inclusive,
Defendants.

Filed May 25, 1999
Entered May 26, 1999

ORDER GRANTING MOTIONS TO DISMISS WITH PREJUDICE AND DISMISSING CIVIL ACTION

By duly filed motions, defendants Columbia Broadcasting System, Inc., CBS Broadcasting Inc., Writers Guild of America, west, Inc. Frank Pierson, Jeff Sagansky, Charles Segars and Brian Walton moved to dismiss Plaintiff's Second Amended Complaint. Each of the motions to dismiss submitted on behalf of each defendant is hereby granted without leave to

amend. Accordingly, IT IS ORDERED that this action is hereby dismissed with prejudice. IT IS FURTHER ORDERED that this Order is a final judgment for purposes of F. R. Civ. P. 54(a), and it shall be entered pursuant to F. R. Civ. P. 58 and served upon the parties.

Dated: May 25, 1999

/s/
United States District Judge

Not selected for publication in the Federal Reporter.

No. 99-56108.
D.C. No. CV-98-10064-JSL.

United States Court of Appeals,
Ninth Circuit.

Migdia CHINEA-VARELA, a/k/a Migdia C. Varela,
Plaintiff-Appellant,

v.

COLUMBIA BROADCASTING SYSTEMS, INC., a California corporation; CBS BROADCASTING INC., a New York corporation; WRITERS GUILD OF AMERICA WEST, INC., a California corporation; FRANK PIERSON, an individual; JEFF SAGANSKY, an individual; CHARLES D. SEGARS, an individual; BRIAN WALTON, an individual,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California,
J. Spencer Letts, District Judge, Presiding

Argued and Submitted Feb. 8, 2001.
Decided Feb. 16, 2001.
Filed Feb. 16, 2001

Before PREGERSON, CANBY, and DAVID R. THOMPSON, Circuit Judges.

MEMORANDUM fn1

Migdia Chinea-Varela appeals the district court's dismissal of her amended complaint alleging employment discrimination and retaliation against Columbia Broadcasting Systems, Inc. ("CBS"), the Writers Guild of America, West, Inc. ("WGA"), and four named individuals. The district court dismissed her complaint without granting her leave to amend for failure to state a claim under Fed.R.Civ.P. 12(b)(6) and failure to comply with Fed.R.Civ.P. 8. Although Varela twice amended her complaint in response to suggestions by the defendants, she did not have the opportunity to amend her complaint in response to directions from the court. We reverse in part and affirm in part the district court's dismissal with prejudice.

The district court erred by dismissing with prejudice Varela's employment discrimination (disparate treatment and disparate impact) claims against CBS and the WGA under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000a *et seq.* and the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12900-12996. A reading of Varela's second amended complaint suggests that her alleged discrimination claims might be saved by amendment. *See Schneider v. California Dept. of Corr.*, 151 F.3d 1194, 1196 (9th Cir.1998) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.").

We affirm the district court's dismissal with prejudice of the named individuals as defendants in the discrimination and retaliation claims asserted under

Title VII. *See Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir.1996) (holding that employees cannot be sued in their individual capacities under Title VII). We reverse the district court's dismissal, without leave to amend, of Varela's retaliation claims against CBS and WGA under Title VII and the FEHA, as well as the district court's dismissal, without leave to amend, of Varela's retaliation claims asserted against the individual defendants under the FEHA. Varela should have been granted leave to amend, except with regard to her retaliation claim against the individual defendants under Title VII.

We agree with the district court that Varela's verbose, lengthy and convoluted complaint violated the requirements of Fed.R.Civ.P. 8(a) that the pleadings shall contain "a short and plain statement" of the case, and Fed.R.Civ.P. 8(e)(1) that "each averment of a pleading shall be simple, concise, and direct." Rather than dismiss with prejudice, however, the district court should have afforded Varela the opportunity to amend her complaint to conform to the directive of Rule 8. *Cf, McHenry v. Renne*, 84 F.3d 1172, 1174--80 (9th Cir.1996) (dismissing with prejudice after the district court provided the plaintiff with three opportunities to amend the complaint in accord with court's specific instructions). We accordingly remand to the district court for further proceedings in conformity with the views herein expressed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Each side to bear its own costs.

Footnotes

fn1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Cir. R. 36-3.

CASE NO. CV 98010064-JSL (AJWx)
[Honorable J. Spencer Letts]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MIGDIA CHINEA-VARELA, etc.,
Plaintiff,

v.

COLUMBIA BROADCASTING
SYSTEM, INC, etc., et al.,
Defendants.

ORDER REGARDING MOTIONS TO DISMISS
THIRD AMENDED COMPLAINT

Date: October 22, 2001
Time: 1:00 p.m.
Room: 4

Filed November 5, 2001
Entered November 6, 2001

This cause came on regularly for hearing on October 22, 2001, the Honorable J. Spencer Letts presiding. Scott D. Myer of the Myer Law Firm appeared on behalf of plaintiff Migdia Chinea-Varela; Anthony R. Segall of Rothner, Segall & Greenstone appeared on behalf of defendants Writers Guild of America, west, Inc. ("WGA"), Frank Pierson ("Pierson") and Brian Walton ("Walton"); Henry Shields, Jr. and Cathy A. Karlstad of Irell & Manella LLP appeared on behalf of defendants

CBS Broadcasting Inc. ("CBS"), Jeff Sagansky ("Sagansky") and Charles D. Segars, Jr. ("Segars").

Having reviewed the motions to dismiss the Third Amended Complaint filed by defendants. And having heard the arguments offered by the respective parties, and the cause having been submitted for decision, the Court makes the following order:

IT IS ORDERED:

1. The Third Amended Complaint is dismissed without leave to amend as against defendants WGA, Pierson, Walston, Sagansky and Segars.

2. The Third Amended Complaint is dismissed without leave to amend as against defendant CBS, except with respect to the allegation set forth in sub-paragraphs 43(e) and 43(f) of the Third Amended Complaint, to the extent indicated by the Court on the record at the October 22, 2001 hearing on the motions, Discovery is limited to matters relevant to the allegation set forth in sub-paragraphs 43(e) and 43(f) of the Third Amended Complaint.

Date 11/5/01

J. Spencer Letts
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 98010064-JSL

Date: October 2, 2002

Title: Migdia Chinea-Varela v. Columbia Broadcasting System , Inc., et al.

PRESENT:
THE HONORALBLE J. SPENCER LETTS

Nancy J. Webb	Not Present
Courtroom Deputy	Court Reporter

ATTORNEYS FOR PLAINTIFFS:
Not Present

ATTORNEYS FOR DEFENDANTS:
Not Present

Entered October 3, 2002

PROCEEDINGS: ORDER (In Chambers)

Before the Court is Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or for judgment on the pleading, presently set on calendar for October 8, 2002, at 1:00 p.m.

Fed. R. Civ. P. 12(b)(6) states, in pertinent part, that "[i]f, on a motion asserting the defense numbered (6) to

dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Because matters outside the pleadings have been presented to, and will not be excluded by, the court, Defendants' motion to dismiss will be treated as one for summary judgment.

On November 5, 2001, the court issued an order granting Defendants' motion to dismiss Plaintiff's Third Amended Complaint, except as to Paragraphs 43(e) and (f) for retaliation. The parties have had nearly a year to conduct discovery in connection with the two remaining retaliation claims. Moreover, Plaintiff was "fairly apprised" fn1 of the likelihood that judgment at leas as of the time the motion was filed on September 17, 2002. fn2

Although Plaintiff has had ample time to gather evidence to oppose a motion for summary judgment, she may have until November 4, 2002, to file a supplemental opposition to Defendants' motion. Defendants' reply shall be filed no later than November 12, 2002. The hearing on this motion shall be continued from October 8, 2002, to November 18, 2002 at 1:00 p.m.

Initials of Deputy Clerk

MINUTES FORM 11

CIVIL – GEN

Footnotes

fn1 Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1532-33 (9th Cir. 1985) ("notice is adequate if the party against whom judgment is entered is 'fairly apprised' that the court will look beyond the pleading, thereby transforming the motion to dismiss into a motion for summary judgment.") (citations omitted).

fn2 In support of their motion to dismiss, Defendants attached, inter alia, the Declaration of Frank Dawson, dated February 12, 2002, which Plaintiff had submitted to Defendants on or about March 8, 2002.

CV 98010064-JSL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGDIA CHINEA-VARELA,
Plaintiff,

v.

COLUMBIA BROADCASTING
SYSTEM, INC, etc., et al.,
Defendants.

ORDER RE DEFENDANT'S MOTIONS
FOR SUMMARY JUDGMENT

Filed: December 12, 2002
Entered: December 16, 2002

The motions of Defendant CBS Broadcasting Inc. for summary judgment were decided without hearing on December 2, 2002.

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law,

IT IS FURTHER ORDERED:

(1) That the motion of Defendant CBS Broadcasting Inc. to dismiss or for judgment on the pleadings, filed September 17, 2002, and converted by the Court to a motion for summary judgment be GRANTED for the reasons set forth in the Statement of Uncontroverted

Facts and Conclusions of Law, filed concurrently herewith, as modified.

(2) That the motion of CBS Broadcasting Inc. for summary judgment for failure to exhaust administrative remedies, filed October 28, 2002, be DENIED.

IT IS SO ORDERED.

DATED: 12-12-02

J. Spencer Letts
United States District Judge

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CBS Broadcasting Inc.

Case No. CV 98-10064 JSL (AJWx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGDIA CHINEA-VARELA,
aka MIGDIA C. VARELA,
Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a California corporation; CBS BROADCASTING INC., a New York corporation, formerly known as CBS. INC.; WRITERS GUILD OF AMERICA, WEST INC., a California corporation; FRANK PIERSON, an individual; JEFF SAGANSKY,

an individual; CHARLES D. SEGARS, an individual; BRIAN WALTON, an individual; and DOES 1 through 10, inclusive,
Defendants.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF DEFENDANT CBS BROADCASTING INC.'S MOTIONS FOR SUMMARY JUDGMENT

[Supporting Notice of Motion and Motion, Memorandum of Points and Authorities, and Declarations filed separately]

Date: November 18, 2002
Time: 1:00 p.m.
Ctrm: 4

Filed December 12, 2002
Entered December 16, 2002

Pursuant to Local Rule 56-1, Defendant CBS Broadcasting Inc. ("CBS") respectfully submits this Statement of Uncontroverted Facts and Conclusions of Law as to which CBS contends that there is no genuine issue of material fact and which establish that CBS is entitled to judgment as a matter of law on Plaintiff's two remaining claims (paragraphs 43(e) and (f) of the Third Amended Complaint). This Statement of Uncontroverted Facts and Conclusions of Law is submitted in support of the Pleadings, filed September 17, 2002, and converted by this Court to a Motion for Summary Judgment to be heard on November 18, 2002, and in support of CBS's Motion for Summary Judgment

filed on October 28, 2002, to be heard on November 18, 2002.

UNCONTROVERTED FACTS

1. In paragraph o 43(e) of the Third Amended Complaint, Plaintiff alleges that "[i]n or about the beginning of August1994, the Plaintiff contacted a producer at Defendant CBS in order to apply for either a staff writing assignment and/or special writing assignments." Plaintiff further alleges in paragraph 43(e) that, when she "attempted to apply for these writing positions and writing assignments," "she was told on or about August 12, 1994" by "this producer at CBS" that "CBS wants nothing to do with you" and "You have been labeled a 'trouble-maker.'" Plaintiff has now identified the unnamed producer as Frank Dawson. Declaration of Cathy A. Karlstad filed on October 28, 2002 ("Karlstad Decl."), Ex D. at 7 (December 28, 2001 letter from Scott Myer). Declaration of Migdia Chinea-Varela ¶¶ 27-28, 31.

2. Plaintiff supplied CBS with a declaration given by Frank Dawson under penalty of perjury during the pendency of this litigation. Declaration of Frank Dawson ("Dawson Decl.") (March 8, 2002 letter from Scott Myer, including the Dawson, Decl., is attached as Exhibit B to the Declaration of Henry Shields, Jr., filed with CBS's Motion to Dismiss or For Judgment on the Pleadings on September 17, 2002).

3. Frank Dawson was not employed by CBS during the 1993 through 1995 time period. Declaratino of Dianne Holloway filed on October 28, 2002 ("Holloway Decl."), ¶ 3; Dawson Decl., ¶ 6.

5. Frank Dawson does not recall "having told (Plaintiff) that CBS would not be interested in doing business with her." Dawson Decl., ¶ 9.

6. Frank Dawson does not state that any employee of CBS ever said anything to him regarding Plaintiff. Dawson Decl., ¶¶ 7-9.

7. Frank Dawson indicates that any statements he may have made to Plaintiff were based on his having read in a trade magazine "that she had pressed a claim against CBS regarding a Writers Program set up with the Writers Guild," and not on anything that CBS (or any employee of CBS) said or did. Dawson Decl., ¶¶ 7, 9.

Plaintiff states that in August 1994, she called Dawson's office and made arrangements to pitch some of her ideas to him. Varela Dec. ¶30. On or about 8/12/94 Plaintiff met with Dawson at his office. She "attempted to pitch [her] stories and ideas" to Dawson. She told Dawson "that [her] goal was to land a staff writing assignment on a series, and [she] inquired as to whether there was any writing position at CBS that would be suitable for [her]." Dawson told her "it would be difficult" to obtain an assignment from CBS because of her protected activities and that "CBS would have no more interest" in her because of her complaints. Varela Dec., ¶¶ 33-34

8. In paragraph 43(f) of the Third Amended Complaint, Plaintiff alleges that "on at least one occasion, CBS directed an independent production company to reject the Plaintiff's application for a particular writing assignment project." Plaintiff has

now identified this independent production company as Craig Anderson Productions. Karlstad Decl., Ex. D at 8 (December 28, 2001 letter from Scott Myer).

9. Beginning in approximately December 1999 or January 2000, Craig Anderson Productions (an independent production company from which CBS had in the past acquired television programming) began putting together a television movie project based on the Elian Gonzales story. Declaration of Craig Anderson filed on October 28, 2002 ("Anderson Decl."), ¶¶ 1-3; Declaration of Joan Yee filed on October 28, 2002 ("Yee Decl."), ¶ 3. Verelo Dec. ¶ 36.

10. At all times during the years 1999 and 2000, Craig Anderson Productions was an independent production company and had no corporate affiliation in any way with CBS. Anderson Decl., ¶ 1.

11. CBS agreed to develop with Craig Anderson Productions the television movie about Elian Gonzales that Craig Anderson Productions planned to produce. Anderson Decl., ¶ 3; Yee Decl., ¶ 3.

12. As the producer of the prospective television movie Craig Anderson and Craig Anderson Productions had the primary responsibility of hiring a writer for the Elian Gonzales television project. Anderson Decl. ¶¶ 3-8; Yee Decl., ¶¶ 4-6.

13. Defendant claims that no one from CBS was involved in identifying potential writers or in interviewing any potential writers for the Elian Gonzales television project. Anderson Decl., ¶¶ 3-8; Yee Decl., ¶¶ 4-7.

13a. Plaintiff claims that Anderson told her "that they would only need to seek the approval of CBS in order to hire [her], which is common procedure." Varela Dec. ¶ 39.

14. Craig Anderson considered 15-20 writers for the Elian Gonzales project by evaluating their writing samples and conducting interviews both on the telephone and in person. Anderson Decl., ¶ 3.

15. Craig Anderson considered Plaintiff for the Elian Gonzales television project. Mr. Anderson had one meeting with Plaintiff and may have followed up on that meeting with one or two telephone call with Plaintiff. Anderson Decl., ¶ 4.

16. Craig Anderson ultimately chose to hire another writer, Rafael Lima, for the Elian Gonzales television project. Anderson Decl., ¶ 5.

17. Craig Anderson chose to hire Rafael Lima instead of Plaintiff as the writer for the Elian Gonzales television project because Mr. Anderson believed that Mr. Lima was more talented and more qualified to work on the project. Anderson Decl., ¶¶ 5-6.

18. Rafael Lima had escaped from Cuba at the age of seven and was highly connected in the Cuban-American community. He had lived in the area of Cuba where Elian Gonzales's father lived. Moreover, Mr. Lima lived in Florida, teaching screenwriting at the University of Miami, as well as a full-time screenwriter. Mr. Lima even had potential access to Elian Gonzales and his family. Anderson Decl., ¶ 5.

19. Craig Anderson believed that Rafael Lima's connections to the Cuban-American community in Florida made him particularly appropriate to work on the Elian Gonzales project. Anderson Decl., ¶ 5.

20. Craig Anderson believed that Rafael Lima was a better writer than Plaintiff. Anderson Decl., ¶ 5.

21. On February 9, 2000, Craig Anderson forwarded the scripts and resumes of the three writers he, including Rafael Lima and Plaintiff, to Joan Yee, the executive at CBS involved with the Elian Gonzales television project. Anderson Decl., ¶ 7; Yee Decl., ¶ 5.

22. In his cover letter to Joan Yee, Craig Anderson informed her that, while he thought all three writers were qualified, "after extensive conversations with all three, I think Rafael Lima is our best choice." He also emphasized Mr. Lima's excellent qualifications, including the fact that he had escaped from Cuba at age seven, that he lived in the Cuban-American community, that he had personal access to Elian and his relatives, and that he had just finished a novel about searching for his roots in Cuba. Mr. Anderson informed Ms. Yee that "Rafael has a pretty good start on a take for this story and I personally think that he's our man." Anderson Decl., ¶ 7, Ex. A; Yee Decl., ¶ 5 Ex. A.

23. The CBS executive involved with the Elian Gonzales project (Joan Yee) did not read the writing samples of Plaintiff or any writer other than Rafael Lima that were submitted by Craig Anderson. Yee Decl., ¶ 6.

24. CBS never did voice any objection to Craig Anderson hiring Mr. Lima for the project. Anderson Decl., ¶ 8, Yee Decl., ¶ 6.

25. Plaintiff has no evidence that CBS directed Craig Anderson not to hire Plaintiff (or anyone else) for the Elian Gonzales television project. Anderson Decl., ¶ 6; Yee Decl., ¶ 7.

26. Plaintiff has no evidence that CBS directed Craig Anderson to hire Rafael Lima (or anyone else) for the Elian Gonzales television project. Yee Decl., ¶ 7.

27. No one at CBS had any discussions with Craig Anderson regarding Plaintiff. Anderson Decl. ¶ 6; Yee Decl., ¶ 7.

28. Craig Anderson had no knowledge that Plaintiff had any complaint against, or dispute with, CBS due to its Latino Writers Program, or anything else, until October 2002, when he was contacted by CBS's counsel. Anderson Decl., ¶ 10.

29. Joan Yee, the CBS executive involved with the Elian Gonzales television project, had no knowledge that Plaintiff had any complaint against, or dispute with, CBS due to its Latino Writers Program, or anything else until October 2002, when she was contacted by CBS's counsel. Yee Decl., ¶ 9.

CONCLUSIONS OF LAW

1. Federal Rule of Civil Procedure 56(c) provides that the court shall enter summary judgment when "the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. To defeat CBS's motion for summary judgment, Plaintiff must produce specific facts demonstrating the need for trial, Celotex Corp. v. Catrett, 477 U.S. 377, 322-24 (1986), as well as "evidence sufficient to support a jury verdict in [her] favor." Franchise Tax Board v. MacFarlane (In re MacFarlane), 83 F.3d 1041, 1046 (9th Cir. 1996)(citation omitted).

3. To meet her burden in opposing CBS's motion for summary judgment, Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If the evidence offered by Plaintiff "is merely colorable, or is not significantly probative, summary judgment must be granted." Id. at 249-50 (citations omitted).

4. When the claims is implausible, the nonmoving party "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Matsushita, 475 U.S. at 587.

5. "[I]f the nonmoving party bears the burden of proof on an issue at trial, the moving party need not produce affirmative evidence of an absence of fact to satisfy its burden. The moving party may simply point to the absence of evidence to support the nonmoving party's case." In re Brazier Forest Prods., Inc., 921 F.2d. 221, 223 (9th Cir. 1990)(citation omitted).

6. "Lawsuits claiming retaliatory employment termination in violation of [the California Fair Employment and Housing Act ("FEHA")] are analogous to federal Title VII claims, and are evaluated under federal law interpreting Title VII cases." Flait v. North Am. Watch Corp., 3 Cal. App. 4th 467, 475-76 (1992); Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 n.4 (9th Cir. 1991).

7. The McDonnell Douglas burden shifting analysis applies to retaliation claims under Title VII and FEHA. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1064 (9th Cir. 2002) (Title VII); Flait Cal. App. 4th at 476 (FEHA).

8. To survive a motion for summary judgment, Plaintiff must first establish a prima facie case of retaliation. In order to establish a prima facie case for retaliation under Title VII or FEHA, Plaintiff must show that: (1) she engaged in a protected activity; (2) she suffered an adverse employment decision; and (3) there was a causal link between the protected activity and the adverse employment decision. See Villiarimo 281 F.3d at 1064 (Title VII); Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 614 (1989) (FEHA).

9. In the absence of evidence that the individuals who allegedly denied Plaintiff employment were aware of her past complaints against CBS, "the causal link necessary for a claim of retaliation can not be established." Morgan v. Regents of the Univ. of Cal., 88 Cal. App. 4th 52, 73 (2000).

10. Even if Plaintiff had established a prima facie case of retaliation with respect to the action allegedly taken by Craig Anderson Productions, if Craig Anderson Productions articulates a legitimate, nonretaliatory reason for the action taken, Plaintiff in order to survive a motion for summary judgment must show that the reason given is a pretext for illegal retaliation. See Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) (Title VII); Flait, 3 Cal. App. 4th at 476 (FEHA).

11. In connection with paragraph 43(e) of the Third Amended Complaint, Plaintiff has not shown that she suffered an adverse employment decision by CBS; therefore, she has not established a prima facie case of retaliation. See Villiarimo, 281 F.3d at 1064; Fisher, 214 Cal. App. 3d at 614. Rather, ¶¶33-34 of Plaintiff's Declaration make clear that when she met with Dawson on 8/12/94, she attempted to find out whether there were any open positions for which she could apply. When Dawson told her it would be difficult to obtain a position with CBS and that CBS would have no interest in her, it appears she went no further. Plaintiff has not shown that there were open writing positions at CBS for which she was qualified.

12. Plaintiff has not identified any supposed writing position at CBS for which she purportedly applied in

August 1994. Moreover, Plaintiff cannot claim such application would have been futile because she has not shown that Dawson had the authority to hire her for any open position at CBS. Accordingly, Plaintiff had no right to rely on Dawson's prediction and assume that she would have been rejected.

13. Plaintiff has not produced any evidence that Frank Dawson engaged in any adverse employment action against her.

14. In any event, CBS is not liable for the actions of Frank Dawson because he was not employed by CBS.

15. In connection with paragraph 43(f) of the Third Amended Complaint, Plaintiff has not shown that there was a causal link between an adverse employment decision by CBS and her alleged protected activities; therefore, she has not established a prima facie case of retaliation. See Villiarimo, 281 F.3d at 1064; Fisher, 214 Cal. App. 3d at 614.

16. The decision whom to hire on the Elian Gonzales project was made by Craig Anderson of Craig Anderson Productions not CBS; therefore, CBS is not liable for the decision.

17. Neither Craig Anderson nor the executive at CBS involved with the Elian Gonzales project was aware of Plaintiff's alleged protected activities at the time the decision whom to hire for the project was made, thus "the causal link necessary for a claim of retaliation can not be established." Morgan, 88 Cal. App. 4th at 73.

18. Craig Anderson chose to hire another writer for the Elian Gonzales project because he believed that writer was more talented and more qualified for the project, not in retaliation for Plaintiff's alleged protected activities. Thus, there is no causal link between Craig Anderson's decision not to hire Plaintiff and her alleged protected activities.

19. Craig Anderson Productions has articulated a legitimate, nonretaliatory reason why Plaintiff was not hired by Craig Anderson for the Elian Gonzales television project – Craig Anderson believed that another writer was more talented and more qualified for the project.

20. Plaintiff has produced no evidence that Craig Anderson Productions' legitimate, nonretaliatory reason is a pretext.

21. Plaintiff has failed to produce evidence in support of her remaining two claims (in paragraphs 43(e) and 43(f) of the Third Amended Complaint). Those claims fail as a matter of law and summary judgment must be granted to CBS.

Dated: October 28, 2002

Respectfully submitted,

IRELL& MANELLA LLP
Henry Shields, Jr.
Cathy A. Karlstad

By:
Cathy A. Karlstad
Attorneys for Defendant
CBS Broadcasting Inc.

Nos. 03-55106, 03-55225
D.C. No. CV-98-10064-JSL
Central District of California,
Los Angeles

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGDIA CHINEA-VARELA, a/k/a Migdia C. Varela,
Plaintiff-Appellant,

v.

CBS BROADCASTING INC.; COLUMBIA BROADCASTING SYSTEM, INC., a California corporation; WRITERS GUILD OF AMERICA, WEST, INC., a California corporation; FRANK PIERSON; JEFF SAGANSKY; CHARLES D. SEGARS; BRIAN WALTON,
Defendants-Appellees.

MIGDIA CHINEA-VARELA, a/k/a Migdia C. Varela,
Plaintiff-Appellee,

v.

CBS BROADCASTING INC.; COLUMBIA BROADCASTING SYSTEM, INC.,
a California corporation,
Defendants-Appellants,

and

WRITERS GUILD OF AMERICA, WEST, INC., a California corporation; FRANK PIERSON; JEFF SAGANSKY; CHARLES D. SEGARS; BRIAN WALTON,
Defendants.

Filed August 5, 2004

ORDER

Before: McKEOWN, BYBEE, Circuit Judges, and Breyer, District Judge.

The Panel judges have voted to deny Appellant-Cross Appellee's petition for rehearing. Judges McKeown and Bybee voted to deny the petition for rehearing en banc, and Judge Breyer recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant-Cross Appelle's petition for rehearing and petition for rehearing en banc, filed July 9, 2004, is DENIED.

Footnotes

* The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

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CASE NO.: CV 98-10064-JSL(AJWx)

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MIGDIA CHINEA-VARELA,
aka MIGDIA C. VARELA,
Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a California corporation; CBS BROADCASTING INC., a New York corporation, formerly known as CBS INC.; WRITERS GUILD OF AMERICA, WEST, INC., a California corporation; FRANK PIERSON, an individual; JEFF SAGANSKY, an individual; CHARLES D. SEGARS, an individual; BRIAN WALTON, an individual; and DOES 1 through 10, inclusive,
Defendants.

THIRD AMENDED COMPLAINT FOR NATIONAL ORIGIN DISCRIMINATION/HARASSMENT AND RETALIATION; CLASS ACTION; DEMAND FOR JURY TRIAL

JUDGE: HON. J. SPENCER LETTS
CTRM.: 4

Post-Remand Status Conference:
DATE: Monday, May 21, 2001
TIME: 8:30 a.m.
CTRM.: 4

[30-Days Leave to Amend Granted by Minute Order Dated May 21, 2001 and Entered May 23, 2001]

Filed June 20, 2001

Plaintiff MIGDIA CHINEA-VARELA, also known as MIGDIA C. VARELA, complains of Defendants, and each of them, demands a trial by jury of all issues, and alleges:

JURISDICTIONAL AND GENERAL ALLEGATIONS:

1. The action arises under the Constitution of the United States and its laws including under the provisions of *Title VII*, of the *Civil Rights Act of 1964*, as amended, 42 U.S.C. §2000e et seq., including but not limited to §§ 2000e, 2000e-2, 2000e-3 and 2000e-5, as well as the *Civil Rights Act of 1991*, (hereinafter collectively referred to as "*Title VII*"), as well as under the general federal question jurisdiction provisions of 28 U.S.C. Sections 1331, as each has been amended

from time to time, to redress and enjoin discriminatory and retaliatory employment and membership practices of defendants in violation of those statutes.

2. Supplemental jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1367 over the State law claims which are so related to federal claims in the action that they form part of the same case or controversy under *Article III* of the *Constitution of the United States of America*, including those claims under the *Fair Employment and Housing Act* (*California Government Code* §§12900(a)-12996), (hereinafter "FEHA"), including, the *California Fair Employment and Practices Act, Government Code* §12940, *et seq.*, including but not limited to §12940, which prohibits discrimination as well as retaliation against a person in the terms, conditions, or privileges of employment and membership on the basis of the person's national origin, and the corresponding regulations of the *California Fair Employment and Housing Commission* ("State Law").

3. Venue is proper in the Central District of the State of California because a substantial part of the events or omissions giving rise to the claim occurred in this District, in that all or a substantial part of the employment practices complained of occurred in the State of California, because the Plaintiff would have been employed in the District but for the unlawful employment and hiring practices. Further, venue is proper because each defendant resides in the State of California within the meaning of 28 U.S.C. §1391(b) and (c), and because one or more of the Defendants resides in this District, including having its principal office is located in the State of California.

PARTIES:

4. a. Defendant CBS BROADCASTING INC., a New York corporation, formerly known as CBS INC., (hereinafter referred to as "CBS BROADCASTING"), is a corporation organized and existing under the laws of the State of New York, and is an entity subject to suit under both the *FEHA* and *Title VII*, in that defendant is an employer who regularly employs at least fifteen or more persons. Based upon information and belief, the Plaintiff alleges that CBS BROADCASTING has its principal place of business in Los Angeles County, California. CBS BROADCASTING's corporate name prior to on or about December 22, 1997, was CBS INC. Plaintiff is informed and believes, and based upon such information and belief, that at certain times, CBS BROADCASTING has at times conducted its business by and through CBS ENTERTAINMENT, which is a Division of CBS BROADCASTING, and which Division of CBS BROADCASTING is intended to be included within the Defendant sued herein as CBS BROADCASTING.

b. Defendant COLUMBIA BROADCASTING SYSTEM, INC., a California corporation, (hereinafter, referred to as "COLUMBIA"), was a corporation organized and existing under the laws of the State of California, and is an entity subject to suit under both the *FEHA* and *Title VII*, in that defendant is an employer who regularly employed at least fifteen or more persons. Based upon information and belief, the Plaintiff alleges that CBS BROADCASTING has its principal place of business in Los Angeles County, California, and that

COLUMBIA was "dissolved" on or about September 17, 1998, without providing for the payment the debts of said corporation as they relate to this lawsuit. Plaintiff is informed and believes, and based upon such information and belief, the Plaintiff alleges that COLUMBIA was a holding company, parent corporation, subsidiary corporation and/or related corporation to CBS BROADCASTING that conducted some or all of the business of CBS BROADCASTING under the corporate umbrella of COLUMBIA.

c. Hereinafter, CBS BROADCASTING and COLUMBIA will be individually and collectively referred to as "CBS." CBS is comprised primarily of Caucasian employees and agents. CBS, as does every television network, has their own "in-house" production companies, which hire writers. At all times relevant thereto, CBS had openings for staff writers and special writing assignments, for which CBS sought writers.

d. During a portion of the time mentioned in this Complaint, Defendant JEFF SAGANSKY, an individual, (hereinafter referred to as "SAGANSKY"), was the President of the Defendant CBS, his employer, and a resident of Los Angeles County, California. SAGANSKY is a Caucasian male and was acting at least in part within the course and scope of his employment and agency with CBS. SAGANSKY is sued herein in both his official capacity and personally.

e. During a portion of the time mentioned in this Complaint, Defendant CHARLES D. SEGARS, an individual, (hereinafter referred to as "SEGARS"), was the Vice-President of the Defendant CBS, his employer, and a resident of Los Angeles County,

California. SEGARS is a Caucasian male and was acting at least in part within the course and scope of his employment and agency with CBS. SEGARS is sued herein in both his official capacity and personally.

5. a. Defendant WRITERS GUILD OF AMERICA, WEST, INC., (hereinafter, referred to as "WGA"), is a corporation organized and existing under the laws of the State of California, with its principal place of business in Los Angeles County, California, and is an entity subject to suit under both the *FEHA* and *Title VII*, in that defendant is an employer who regularly employs at least fifteen or more persons and who regularly had fifteen or more members and at all times mentioned in this Complaint, Defendant WGA was and is the official union, i.e., official labor organization, of all professional writers for television and/or film, and was the certified representative of employees under the provisions of the *National Labor Relations Act* (and/or is a labor organization recognized or acting as the representative of employees of employers engaged in an industry affecting commerce, that being the entertainment industry). WGA is comprised primarily of Caucasian employees, agents and members.

b. During a portion of the time mentioned in the Complaint, Defendant FRANK PIERSON, an individual, (hereinafter referred to as "PIERSON"), was the President of the Defendant WGA, and a resident of Los Angeles County, California. PIERSON is a Caucasian male, and was acting at least in part within the course and scope of his position and/or employment with WGA. PIERSON is sued herein in both his official capacity and personally.

c. During a portion of the time mentioned in this Complaint, Defendant BRIAN WALTON, an individual, (hereinafter referred to as "WALTON"), was the Executive Director of the Defendant WGA, his employer, and a resident of Los Angeles County, California. WALTON is a Caucasian male and was acting at least in part within the course and scope of his employment and agency with WGA. WALTON is sued herein in both his official capacity and personally.

6. The true names and capacities of defendants named herein as DOES 1 to 10, inclusive, are unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences, events, harassment, discrimination, retaliation and damages herein alleged, and that Plaintiff's injuries as herein alleged were proximately caused by the aforementioned defendants. Plaintiff will amend this complaint to show such true names and capacities when the same have been ascertained.

7. Plaintiff is informed and believes and thereon alleges that at all times mentioned herein, each of the defendants was the agent and/or employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting at least in part within the course and scope of such agency and employment.

8. Plaintiff, MIGDIA CHINEA-VARELA, aka MIGDIA C. VARELA, (hereinafter, referred to as "Plaintiff"), is an adult person of Hispanic national origin and a resident of the County of Los Angeles, State of California. At all times mentioned in this

Complaint, Plaintiff was and is a professional screenwriter and member of the WGA, including at all times material to this action and at the present time was and is a WGA member. Further, as more particularly described below, Plaintiff was an applicant for employment of Defendant CBS. The unlawful employment practices complained of herein occurred in Los Angeles County, California.

CLASS ACTION ALLEGATIONS:

9. Plaintiff experienced discrimination and retaliatory discrimination in that Defendants, and each of them, failed to consider her for pay equivalent to collective bargaining agreement employment because she was Hispanic and then retaliated against her because she protested a Half-Pay Program for Hispanic writers. Plaintiff is also suing as a member of the class of all available Hispanic writers residing in the 1990 U.S. Census Area Referred to as "Los Angeles–Anaheim–Riverside, CA CMSA, California." Plaintiff is suing individually and as a member of this class and as a member of the subclass of Hispanic WGA members. Plaintiff is and was a resident of the County of Los Angeles and the State of California.

10. The Plaintiff is a member of both the class of all available Hispanic writers residing in the 1990 U.S. Census Area Referred to as "Los Angeles–Anaheim–Riverside, CA CMSA, California," and the subclass of available Hispanic writers who are members of the WGA. The class and subclass have both been adversely affected by the discriminatory denial of pay equivalent to collective bargaining agreement based upon national origin, Hispanic, and based upon the chilling effect of

the intrusive Half Pay Program, and other discriminatory conduct and inactions by the Defendants, and each of them, including the denial of access to the normal and regular channels of consideration for writing assignments and staff writing positions. The class, including non-members of the WGA would obtain more and better writing assignments if they would be allowed to utilize the usual and normal channels of consideration, otherwise available for non-Hispanics, for writing assignments and staff writing positions, rather than be forced to use the intrusive Half-Pay Program.

11. Based upon the U.S. Census "1990 Census Equal Employment Opportunity File," which is the nearest census year to the events in question herein, and its listing for the category "Authors (183)" consisting of a total civilian workforce pool of 13,532 total such writers and 520 "Hispanic" writers, reflecting a 3.8% availability of Hispanic writers in comparison to all writers, it is estimated that the class membership of all available Hispanic writers residing in the 1990 U.S. Census Area Referred to as "Los Angeles–Anaheim–Riverside, CA CMSA, California," approximates 520 or more such writers. Further, based upon the current membership statistics for the WGA, the subclass of available Hispanic writers who are members of the WGA, approximates 75 Hispanic writers.

12. This is an employment discrimination case by a member of the WGA, alleging a continuing series of discriminatory conducts against Plaintiff because of her national origin, Hispanic, and because she complained about unlawful discrimination and participation in formal proceedings to protest such unlawful

discrimination. The members of the class and subclass likewise suffered such discrimination and there is therefore a "commonality" of the questions of law and fact with them.

13. Plaintiff seeks a declaration that the acts of the Defendants CBS and WGA, and their agents, and each of them, intentionally and unlawfully discriminated against her because of her national origin, Hispanic, and in retaliation for opposing such discrimination, appropriate injunctive relief, lost pay, compensatory and punitive damages. Other members of the class and subclass would have to varying degrees similar such claims. These claims are "typical" of the claims of the other members of the class and subclass.

14. The nature of the notice contemplated to the proposed subclass of Hispanic WGA member writers is to have such notice mailed to their address of record with the WGA. The nature of the notice contemplated to the proposed class, as defined above, other than to the subclass of Hispanic WGA member writers, is to have a "Public Notice" classified advertisement published twice in one of the industry trades, either the Daily Variety or the Hollywood Reporter, notifying potential class members of this lawsuit.

15. Plaintiff is informed and believes and based on such information and belief, Plaintiff alleges that Hispanics as a class have been adversely affected by the Half Pay Program by allowing signatories to the MBA to hire professional writers for half the relevant minimum if they claim to be Hispanic, herein referred to as the "Half-Pay Program." Whether by intent, design or practice, even if the Half-Pay Program was

originally conceived only for inexperienced non-members of the WGA, in practice, operation and application the Half-Pay Program forced all, or nearly all, Hispanics, including the Plaintiff, to either apply through or have their applications channeled through the Half-Pay Program. Said discrimination was largely carried out by the WGA and CBS referring and channeling anyone with a Hispanic surname, such as the Plaintiff's surname "Varela," to have their application considered through said Half-Pay Program. All, or most, Hispanic writers were no longer permitted by the WGA and CBS to apply through the normal channels of application.

16. Since starting the Hispanic Half-Pay Program, Defendants, through practices common to all of the Defendants, discriminated against Plaintiff and other potential Hispanic applicants for employment, and have denied them equal opportunities in employment because of their national origin, Hispanic. As a result of this discrimination, the Plaintiff, and other class members, were either not hired at "full-pay," or not at all.

17. The discriminatory practices described in this Complaint prevented Plaintiff and the other class members, because of their national origin, Hispanic, from making employment contracts on the same basis and with the same freedom as is enjoyed by persons with other national origins, entitling Plaintiff and the other class members to monetary and injunctive relief.

18. The class and subclass members with claims under federal and/or State of California law set forth herein arising from discrimination and/or retaliation

based upon their national origin, Hispanic, bring this action as a class action under Federal Rules of Civil Procedure 23(a) and (b)(1), (b)(2) and (b)(3). Therefore, with respect to the proposed classes defined above, Plaintiff alleges as follows:

19. The members of the class are so numerous that it is impracticable to bring all of them before the Court. The number of class members who have been denied the opportunity to be considered for employment and/or discriminated against by Defendants can be determined from Defendant WGA's membership records and Defendant CBS's personnel records, but number approximately 520 or more for the class and approximately 75 for the subclass.

20. There are questions of law and fact common to the members of the class. This complaint presents questions of whether Defendants, through acts and omissions of their management and supervisory workforce and through a common plan, discriminated against Hispanic writers, through a failure to allow them to be considered for employment through the usual and normal channels otherwise available to non-Hispanics. Inquiry into Defendant CBS's employment practices, procedures, data, and common plan of hiring Hispanics and placing them into the Half-Pay Program, and into Defendant WGA's referral practices, procedures, data, and common plan of referring Hispanics and placing them into the Half-Pay Program will be required to resolve these questions and to fashion appropriate relief for the named Plaintiff and the class and subclass members.

21. The claim of the class representative is typical of those of the other class members, because the Plaintiff and all class members are similarly adversely affected by the failure to hire Hispanics, by the forcing them into the Half-Pay Program and the failure to consider them for employment through the usual and normal channels otherwise available to non-Hispanics, which was implemented in a discriminatory fashion and with discriminatory intent and impact, by Defendants, and each of them, through, among other devices, an arbitrary and subjective decision-making process and an arbitrary Half-Pay Program.

22. The representative party will fairly and adequately protect the interests of the class, because her claims are typical and raise common issues, as reflected in the preceding paragraphs and in this Complaint, and because she has retained counsel, who has experience in the field of employment discrimination and in suing entertainment industry entities.

23. Defendants, and each of them, have acted and have refused to act, and continue to do so, on grounds generally applicable to the class, in that they have made and effectuated decisions affecting the opportunities and conditions of the class members based on their national origin–Hispanic, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

24. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and

efficient adjudication of the issues.

GENERAL ALLEGATIONS APPLICABLE TO ALL CAUSES OF ACTION:

25. The television studios, including CBS, do not have a formal application process for receiving applications for staff writing positions and/or special writing assignments. The way people obtain work and employment in television is first by securing a story meeting, usually by first submitting scripts or screenplays to the studios. If a writer is successful in obtaining a story meeting, he or she "pitches" the story ideas. To "pitch" means to attempt to sell one's story idea. If the writer is successful at her or her story meeting, he or she gets an assignment/employment.

26. Prior to the Half-Pay Program, Plaintiff, and certain of the other experienced Hispanic writers, managed to pitch their stories directly to the various studios. However, after the Half-Pay Program was created and implemented in or about October, 1993, Plaintiff and other similarly situated Hispanic writers who sought work with CBS were forced into the Half-Pay Program, which required such Hispanic writers to label themselves as "trainees" regardless of their level of professional writing experience. Under the Half-Pay Program, the term "Trainee" turned into a euphemism for Hispanic. No qualification, or lack of qualification, other than ethnicity or national origin, i.e., Hispanic, entitled a WGA member or non-member to designate him or herself as a "Trainee" under the Program.

27. Plaintiff and other Hispanic professional writers, if they wished to seek either a staff writing assignment

and/or a special writing project were required to apply through and participate in this Half-Pay Program, which paid less than fifty percent (50%) of what the full time position paid to non-Hispanic professional writers. The Program amounts to discrimination against Hispanics, such as Plaintiff, because the program is limited to solely Hispanics, and creates a system for Hispanics wherein Hispanics are excepted from the protections of the minimum pay scales of the collective bargained MBA. In practice, operation and application, and the way the Half-Pay Program was administered, the Half-Pay Program became the sole means for all Hispanics, both Hispanic trainees and Hispanic WGA members, i.e., Hispanic professional writers, to apply for writing assignments and positions with CBS.

28. The Half-Pay Program amounts to discrimination against the Hispanic WGA members because CBS and the WGA used the Half-Pay Program to pay Hispanic WGA members, such as Plaintiff, approximately only one-half of the minimums set forth in the MBA. Further, the Half-Pay Program amounts to discrimination against the Hispanic WGA non-members because CBS and the WGA used the Half-Pay Program to pay Hispanic WGA members, such as Plaintiff, approximately only one-half of the minimums set forth in the MBA, and this creates a chilling effect not only as to the Hispanic WGA members, but also the Hispanic WGA non-members because seeing that the industry views them as only worth one-half a non-Hispanic, they will not attempt to enter this writing business.

29. Since the institution of the Half-Pay Program by CBS and the WGA, Plaintiff has not received even a

single writing assignment despite her having sought out such writing assignments. Further, after the discrimination and retaliation set forth in this complaint, after the year 1993, since the institution of the Half-Pay Program, the Plaintiff has not received any writing income whatsoever, with the sole exception of residuals that relate to 1993 and prior writing assignment work. Plaintiff is informed and believes, and based on such information and belief the Plaintiff alleges that since the institution of the Program by CBS and the WGA, other class members have either not received even a single writing assignment or have received less writing assignments than they would otherwise have received, despite having sought out such writing assignments.

ADMINISTRATIVE EXHAUSTION:

30. At all times mentioned herein, Title VII and the FEHA were in full force and effect and were binding on all Defendants. These sections require Defendants to refrain from harassing, discriminating against and retaliating against any employee on the basis of, inter alia, national origin and/or engaging in a protected activity. Within the time provided by law, Plaintiff filed charges with the *Equal Employment Opportunity Commission* (hereinafter, "*EEOC*"). As a matter of law and by virtue and a work-sharing agreement between the *EEOC* and the California *Department of Fair Employment and Housing*, (hereinafter, referred to as the "*DFEH*"), each of the *EEOC*'s Administrative Charges of Discrimination also constitutes the Plaintiff's Administrative Charges of Discrimination with the *DFEH*. These Charges were in full compliance with both of these sections, and the Plaintiff

received Notices of Right to Sue. The allegations in this complaint are like and/or reasonably related to and/or growing out of the issues and/or allegations in these Administrative Charges of Discrimination, and therefore all such issues and claims herein reasonably would be expected to be included in the scope of an *EEOC* investigation of such a Charge, and Plaintiff is informed and believes, and Plaintiff is informed and believes, and based thereon alleges, were in fact a part of the *EEOC's* investigation of this matter. Further, each of the Defendants herein either had participated in the acts leading to the administrative charges and/or are like or reasonably related and/or agents and/or employees to the parties listed in the respective Charge, and therefore were reasonably expected to be a part of the *EEOC*'s investigation, and Plaintiff is informed and believes, and Plaintiff is informed and believes, and based thereon alleges, were in fact a part of the *EEOC's* investigation of this matter. Plaintiff filed the original Complaint in this action within ninety (90) days from the date of receipt of each of the Federal Right to Sue Notices/Letters. The one-year statute of limitations on the State Charge was equitably tolled during the pendency of the *EEOC* investigation, and excluding the period of tolling, the Plaintiff filed the original Complaint in this action within one-year of the date of receipt of said State Right to Sue Letter. In this regard,

a. On July 6, 1994, and within 300 days of the date of discrimination herein alleged against Plaintiff by Defendants, Plaintiff filed a charge of discrimination against the WGA, CBS and WALTON, with the *EEOC*. A copy of this charge is appended hereto, marked "Exhibit A," and is incorporated by this reference as

though fully set forth, which will hereinafter be referred to as the "First Charge." On or about July 6, 1994 and on or about July 11, 1994, the *DFEH* issued to Plaintiff a notices of right to sue based on the First Charge. Then on or about September 22, 1998, the *EEOC* issued the Plaintiff a notice of right to Sue based on the First Charge.

b. On February 21, 1995, and within 300 days of the date of discrimination herein alleged against Plaintiff by Defendants, Plaintiff filed a charge of discrimination against the CBS with the *EEOC*. A copy of this charge is appended hereto, marked "Exhibit B," and is incorporated by this reference as though fully set forth, which will hereinafter be referred to as the "Second Charge." On or about February 21, 1995, the *DFEH* issued to Plaintiff a notice of right to sue based on the Second Charge. Then on or about September 22, 1998, the *EEOC* issued the Plaintiff a notice of right to Sue based on the Second Charge.

c. On June 23, 1995, and within 300 days of the date of discrimination herein alleged against Plaintiff by Defendants, Plaintiff filed a charge of discrimination against the WGA with the EEOC. A copy of this charge is appended hereto, marked "Exhibit C," and is incorporated by this reference as though fully set forth, which will hereinafter be referred to as the "Third Charge." On or about June 23, 1995, the *DFEH* issued to Plaintiff a notice of right to sue based on the Third Charge. Then on or about September 22, 1998, the *EEOC* issued the Plaintiff a notice of right to Sue based on the Third Charge.

FIRST CAUSE OF ACTION FOR NATIONAL ORIGIN DISCRIMINATION AND HARASSMENT IN VIOLATION OF TITLE VII AND CALIFORNIA GOVERNMENT CODE §12940 AGAINST DEFENDANTS WGA AND CBS

31. Plaintiff hereby incorporates by reference Paragraphs 1 through 30, above, as if fully set forth herein, and for a causes of action against Defendants WGA and CBS, alleges as follows:

32. Defendant WGA, and said Defendant's agents, officers and supervisors, including but not limited to the following, engaged in harassment of the Plaintiff and other Hispanics, that was both objected to and not welcome, including by the use of derogatory epithets and stereotype images of Hispanics, with the intent of harassing Plaintiff and the class and sub-class members, on account of their national origin, and failed to take immediate and appropriate corrective action to stop the harassment, including as follows:

a. On or about March 3, 1994, WGA and PIERSON posted a message on the Page Bulletin Board Service (hereinafter referred to as "BBS"), to which many and/or most Guild members subscribed at the time. The message continued to refer to Hispanics by the derogatory racial slur "Gang banging Latinos," a racist and derogatory reference to Latinos as all being members of gangs and participants in drive-by shootings, as the subject line of the posting; and,

b. On or about February 27, 1994 and then again on or about March 1, 1994, WGAw's Board of Director Member Catherine Clinch, likewise continued

to use the subject header "Gang-banging Latinos" to refer to Hispanics in her posting on the BBS.

33. Plaintiff sought out and applied for writing assignments, both staff writing positions as well as for special writing assignments, with Defendant CBS, at all times relevant to this Complaint, including, but not limited to the following:

a. On or about June 18, 1993, through and including December 1993, Plaintiff applied for both staff writing positions as well as for special writing assignments with Defendant CBS, but the Defendant CBS did not act on said applications until on or about November 22, 1993, at which time the Defendant CBS refused to hire Plaintiff at the full salary and benefits, but instead, on or about November 22, 1993, steered and channeled Plaintiff's application into the Hispanic Half-Pay Program, and offered the Plaintiff a writing position paying approximately one-half the union wage scale, based solely on the fact that the Plaintiff was a Hispanic. Plaintiff continued to contact the Defendant CBS through on or about December 1993, and beyond, in furtherance of her applications for a staff writing position and special writing assignments. Based in part on this incident, the Plaintiff filed her First Charge.

b. In or about the beginning of August 1994, the Plaintiff contacted a producer at Defendant CBS in order to apply for either a staff writing assignment and/or special writing assignments. However, when the Plaintiff attempted to apply for these writing positions and writing assignments, she was told on or about August 12, 1994, by both this producer at CBS and the producer's assistant words to the effect "CBS

wants nothing to do with you" and "You have been labeled a 'trouble-maker'." Based upon this incident, the Plaintiff filed her Second Charge.

34. At all times herein mentioned, Plaintiff was qualified for the position of staff writer, and each of the special assignment writing projects, with Defendant CBS, including but not limited to, in that:

a. Prior to suffering the effects of the discrimination and discriminatory retaliation, the Plaintiff wrote and received compensation on numerous writing assignments, projects and options, during the period of 1976 through 1993, including on Feature Films and Television scripts the approximate amount of $500,000.00. Further, during this time up to 1993, the Plaintiff co-wrote, co-produced and co-directed assignments that she received approximately $50,000.00 monetary compensation. Further, through this time up to 1993, the Plaintiff received residuals on these writing assignments in the approximate monetary amount of $100,000.00. Therefore, the Plaintiffs approximate writing income during the period of 1976 to 1993 was approximately $45,000.00 per year. With the addition of the estimated approximate monetary value for the benefits of health insurance, favorable tax benefits, etc., of approximately $5,000.00 per year, the Plaintiff earned approximately $50,000.00 per year for writing assignments from 1976 to 1993 prior to the events of the discrimination and retaliation.

b. SEGARS stated on or about October 6, 1993 that the Plaintiff's four sample scripts were "excellent" and that the Plaintiff was a "good writer." Further, he stated that the Plaintiff's work was

"wonderful," and that "SAGANSKY was enthusiastic about [her] work."

c. Plaintiff has submitted sample screenplays/scripts to agents and producers, who have stated that the Plaintiff's screenplays/scripts are "excellent." However, on at least one occasion, CBS directed an independent production company to reject the Plaintiff's application for a particular writing assignment project. Based upon information and belief, and on such basis, the Plaintiff alleges that CBS's direction to reject said application was in retaliation for the Plaintiff's protected activities.

35. Defendants' refusal to hire Plaintiff, a professional accredited screenwriter, at full pay and full benefits constitutes disparate treatment in that it was based on the fact that Plaintiff is of Hispanic national origin. Defendant intentionally refused to hire Plaintiff at the full salary and benefits because of Plaintiff's national origin–Hispanic, and instead steered and channeled her into a Hispanic-only so-called "writing" position that paid only approximately one-half the minimum rate scale paid by Union agreement to all other writers, i.e., the Half-Pay Program. Plaintiff bases this conclusion on the fact that Defendant continued to seek applicants for the positions of both staff writer and special writing assignments, and ultimately hired one or more persons of non-Hispanic national origin at full Union rate salary and benefits, with the same or lessor qualifications than the Plaintiff.

36. The Defendants' policy or practice requiring employment applicants of Hispanic national origin to apply through the Half-Pay Program also caused the

Plaintiff to be denied the employment she desired. This policy or practice has a disparate impact on Plaintiff and other person of her national origin, in that it causes persons of Plaintiff's national origin to be demonstrably disadvantaged, vis-a-vis those candidates of non-Hispanic national origin seeking employment, in the following manner: Defendants' underutilization of Hispanic writers has increased over a ten year period upon the Defendants' introduction of the Program. Furthermore, the Defendants' policy or practice is not justified by any business necessity in that such a Half-Pay Program for Hispanics is neither necessary nor helpful to either the performance of the duties of the jobs for which Plaintiff applied nor to the selection of qualified writers.

37. The Defendants' policy ~~or practice~~ requiring employment applicants to apply through an informal subjective, word of mouth, hiring process also caused the Plaintiff to be denied the employment she desired. This policy or practice has a disparate impact on Plaintiff and other persons of her national origin, in that it causes ~~persons~~ of Plaintiff's national origin to be demonstrably disadvantaged, vis-a-vis those candidates of non-Hispanic national origin seeking employment, in the following manner: Few Hispanic Writers exist in Hollywood who actually write for Hollywood. The WGA's own statistics show that Hispanics as a group comprise only less than one-percent (1%) of the working writers, i.e., members of the WGA, which membership approximates 75 Hispanic Writers total. On the other hand, U.S. Census figures during the events in question, show that Hispanics comprised nearly four-percent (4%) of the available civilian workforce of writers in the local region, or 520 available Hispanic

Writers in the available civilian workforce. This amounts to approximately 75 working Hispanic writers out a total pool of approximately 520 available Hispanic Writers. And, out of these approximately 75 working writers, i.e., WGA members, only "a number that can be counted on the fingers of one hand" work at any one given time. Further, Defendants' underutilization of Hispanic writers has increased over a ten year period. Furthermore, the Defendants' policy or practice is not justified by any business necessity in that such a subjective evaluation procedure is neither necessary nor helpful to either the performance of the duties of the jobs for which Plaintiff applied nor to the selection of qualified writers.

38. The Defendant WGA's policy or practice requiring members to maintain a certain number of writing credits in order to remain in "current" membership status also caused the Plaintiff's WGA membership being changed from a "current" status to a "post-current" status on or about September 2, 1997, and therefore, further hindered her ability to participate in WGA matters affecting the employment of WGA members, including Hispanics, including in particular preventing the Plaintiff and others similarly situated to her from voting on WGA business. This policy or practice has a disparate impact on Plaintiff and other person of her national origin, in that it causes persons of Plaintiff's national origin to be demonstrably disadvantaged, vis-a-vis those candidates of non-Hispanic national origin seeking employment, in the following manner: Hispanic WGA members, have suffered discrimination with regard to their limitation, segregation and classification of members of the WGA and applicants for membership in the WGA, because

such Hispanic members and applicants are more likely to be limited to non-current membership status based upon this discrimination preventing them from obtaining the necessary amount of writing assignments to be considered current. Upon losing "current" status, such a member loses the right to vote on WGA business, including matters that affect said members salary and benefits. Furthermore, the Defendants' policy or practice is not justified by any business necessity in that there is no business necessity for such requirements by the WGA that members must continue to have covered writing assignments in order to continue their "current" membership status, including but not limited to inasmuch as the Plaintiff is informed and believes and thereon alleges that the other entertainment industry unions do not have such a requirement such a subjective evaluation procedure is neither necessary nor helpful to either the performance of the duties of the job for which Plaintiff applied nor to the selection of qualified writers.

39. By engaging in the acts and conduct described above in paragraphs, Defendants WGA and CBS directly and through its employees and agents, unlawfully discriminated against Plaintiff and other class and sub-class members because of her and their national origin in violation of the Federal *Title VII* and the California *FEHA*, including *Government Code* §12940, and regulations promulgated thereunder, and proximately caused the damage and injury to Plaintiff set forth below. This action is also brought pursuant to the *FEHA*, and in particular, *California Government Code* §12940, including former subsection (i), now subsection (k), which requires an employer to take all reasonable steps necessary to prevent discrimination

and harassment from occurring, and the corresponding regulations of the *DFEH*.

WHEREFORE, Plaintiff requests relief as hereinafter provided.

SECOND CAUSE OF ACTION FOR RETALIATION IN VIOLATION OF *CALIF. GOV. CODE* §12940(h), formerly §12940(f) AGAINST DEFENDANTS, AND EACH OF THEM AND IN VIOLATION OF *TITLE VII* AGAINST CBS AND THE WGA

40. Plaintiff hereby incorporates by reference Paragraphs 1 through 39, above, as if fully set forth herein, and for causes of action against all Defendants, and each of them, under State Law, and against Defendants WGA and CBS under Federal Law, alleges as follows:

41. On or about the dates listed below, the Plaintiff, and various of the class members, complained and protested about the Program being discriminatory against Hispanics, at various times, and engaged in other protected activities, including but not limited to the following:

a. At all times relevant hereto, the Plaintiff and other class and sub-class members, spoke out and protested and complained about the studios', including CBS's, under-utilization of Hispanic writers.

b. On or about November 22, 1993, the Plaintiff had a conversation with WALTON in which the Plaintiff complained about the Half-Pay Program

and the fact that it paid only about fifty percent (50%) of the MBA and was therefore discriminatory against Hispanics. WALTON responded to the effect that fifty percent (50%) of something is better than one-hundred percent (100%) of nothing.

c. On or about December 4, 1993, the Plaintiff wrote to SAGANSKY by faxed letter and complained about the Half-Pay Program and the fact that it paid only about fifty percent (50%) of the MBA and was therefore discriminatory against Hispanics.

d. On or about December 7, 1993, the Plaintiff wrote a letter to PIERSON.

e. On or about January 19, 1994, the Plaintiff attempted to report the WGA and CBS discriminatory conduct and the Program to the *EEOC*, at which time, the *EEOC* referred the Plaintiff to the *National Labor Relations Board* (*NLRB*).

f. On or about January 26, 1994, the Plaintiff reported the WGA and CBS discriminatory conduct and the Half-Pay Program to the *NLRB*, and additionally, the Plaintiff filed other *NLRB* Charges at other times.

g. On or about June 23, 1995, an *EEOC* Charge of Discrimination was filed as Charge No. 340951969, against the National Broadcasting Company.

h. On or about July 24, 1995, an *EEOC* Charge of Discrimination was filed as Charge No. 340952144, against the American Broadcasting

Company.

i. The other administrative filings alleged in Paragraphs 30, above.

j. On or about March 12, 1995, the Plaintiff had published in the Los Angeles Times, a Letter to the Editor regarding the Half-Pay Program being discriminatory. That same issue of the Los Angeles Times included another Letter to the Editor from Julio Vera, another Hispanic WGA member, and member of both the class and subclass.

k. In response to the Plaintiff's Letter to the Editor published in the Los Angeles Times, on or about March 12, 1995, several members of the Guild's Latino Writers Committee, who are members of both the class and subclass, stated in a Los Angeles Times, in an on or about March 19, 1995 Letter to the Editor, that, indeed, the CBS program was "discriminatory."

42. On or about the dates listed within below, the Defendants took various retaliatory actions against the Plaintiff, and other class and sub-class members, including but not limited to the following:

a. In or about October 1993, the Defendants CBS, WGA and SAGANSKY imposed a Half-Pay Program upon Hispanics, by requiring Hispanics to apply through the Half Pay Program when they sought writing assignments at CBS rather than use the other means that were available for non-Hispanic writers to seek writing assignments from CBS

b. The Defendant WGA expelled Hispanics disproportionately from the WGA's "Current" Membership status.

c. The Defendants WGA and PIERSON used Derogatory Epithets and Stereotype Images on or about March 3, 1994, when WGA President PIERSON posted a BBS posting on the Page Bulletin Board Service (BBS), to which most Guild members subscribe a posting that continued to refer to Hispanics by the derogatory racial slur "Gang banging Latinos," a racist and derogatory reference to Latinos as all being members of gangs and participants in drive-by shootings, as the subject line of the posting. Further, on or about February 27, 1994 and then again on or about March 1, 1994, WGA's Board of Director Member Catherine Clinch, likewise continued to use the subject header "Gang-banging Latinos" to refer to Hispanics in her posting on the BBS.

d. The Defendants WGA, PIERSON and WALTON failed to communicate with complaining Hispanics after they protested and complained about the Program. Based upon this incident, the Plaintiff filed her Third Charge. In this regard, when the WGA and NBC set up another Hispanic/Latino program, the NBC program, and based upon information and belief, in retaliation for making the above charges and complaints with the various governmental agencies, the WGA failed to notify the Plaintiff of the NBC program until after the WGA had made its own selection of two writers for the NBC program. Further, in this regard, the WGA additionally failed to notify the Plaintiff of other writing employment or assignment matters, in retaliation for making the above charges and

complaints with the various governmental agencies. The WGA, and its agents, retaliated against the Plaintiff by their failure to communicate with her in any way, including refusing to provide her with notices of writing assignment openings or application procedures for applying for such writing assignments.

e. The Defendants attempted to prevent Plaintiff from testifying at the Civil Rights Commission hearing on or about October 20, 1994, and all subsequent such hearings. When the Plaintiff was asked to testify before the U.S. Civil Right's Commission, the WGA attempted to dictate the nature of the Civil Rights hearings and to prevent all subsequent hearings by writing a defamatory letter regarding the Plaintiff to the U.S. Commission on Civil Rights. Further, when the WGA and the EEOC held a public meeting on or about February 20, 1996, and the Plaintiff asked to be present at that meeting, the WGA lied to the Plaintiff by advising her that the meeting was "not open to the public."

f. The Defendants required the signing of a "Settlement Release" as a condition for participation in any "Special Access" program. In this regard, in a WGA/NBC hiring program and another WGA program with ABC, purportedly to assist Hispanic writers, the WGA, in retaliation, including as a "scare tactic," set up these programs to require a "hold harmless" release having nothing to do with the access program to be signed that would have waived all claims against the WGA, language that is only appropriately used in settlement of litigation. The use of this release has an adverse impact on the class of Hispanics because they have already been discriminated against by the WGAw,

and possibly by the affected networks, and signing such release could waive any claims that they have against them. Further, the use of this release further has a further adverse impact on the Plaintiff because the WGA and its agents already knew that the Plaintiff had made claims against the WGA and certain networks, and that signing such release could waive any claims that she may have against them.

g. The Defendant WGA blacklisted the Plaintiff by posting the Plaintiff's name on the WGA BBS service in retaliation for complaining about the Half-Pay Program. In this regard, it should be noted that most, if not all producers, directors and employers of professional writers at the time used the WGA Bulletin Board Service (BBS) online posting service, and that the Plaintiff has a unique name which is singularly descriptive of the Plaintiff, not only in the entertainment industry, but also unique and descriptive of the Plaintiff in the entire United States. An officer of the WGA posted the Plaintiff's name on the BBS as a "complainer." This was done on or about February 27, 1994 and then again on or about March 1, 1994, when WGA Board of Director Member Catherine Clinch likewise continued to use the subject header "Gang-banging Latinos" to refer to Hispanics in her posting on the BBS, and then posted in the second BBS posting that "it was filed by Migdia," referring to a charge of discrimination. The implication of the posting of the Plaintiff's name on the BBS was to "warn" and notify the other subscribers to the BBS that they should not provide the Plaintiff any writing assignments because she is allegedly a "trouble-maker."

h. The Defendants, and each of them, blacklisted complaining Hispanics, including the Plaintiff, and have based on information and belief, prohibited the mentioning of Plaintiff's name any further in any regard whether related to this lawsuit or not by any WGA member.

i. Based upon information and belief, and on such basis, the Plaintiff alleges that CBS's directed an independent production company to reject one or more applications the Plaintiff made for writing assignment projects, in retaliation for the Plaintiff's protected activities.

43. Defendants' actions were caused by and were in retaliation for the protected activities of Plaintiff set forth in Paragraph 41, above, in that there was a causal link between protected activities and the retaliatory actions of defendants, including, but not limited to the following:

a. The Plaintiff is informed and believes, and based thereon, the Plaintiff alleges that each of the Defendants had knowledge of each of these protected activities, including but not limited to the complaints, protests and administrative filings by the Plaintiff, and some of the class members, that the Program was discriminatory against Hispanics.

b. The Defendants threatened to blacklist Hispanics who complain. After Plaintiff and another WGA member, Julio Vera, complained about the Program, on or about December 6, 1993, an angry CBS Executive, SEGARS, telephoned Plaintiff, and also phoned a fellow guild member, Julio Vera, demanding

that they endorse its half-pay program and that they had to support the CBS program whether they liked it or not. The Plaintiff is informed and believes, and based thereon, alleges that this call was made by SEGARS as a result of and in response to the Plaintiff, and other class members, complaints that the Program was discriminatory. Both the Plaintiff and Julio Vera understood that this call was a threat to blacklist them if they did not drop all complaints about the Half-Pay Program being discriminatory.

c. Shortly after publication of the Los Angeles Times articles mentioned above, published on or about March 16, 1995, CBS terminated its Half-Pay Program in response to this admission by the Guild's Latino Writers Committee that the program was "discriminatory," and based upon information and belief, coerced some Latino Writers Committee members to submit a "partial retraction" of their Letter to the Editor by saying that they are sorry "to bite the hand that . . . feed[s] us." Plaintiff is informed and believes and thereon alleges, that Defendants, and each of them, threatened these Latino Writers Committee members to not further speak in this manner, and demanded that they "fall in line"as "good Latinos" behind the position taken by the WGA and CBS, or suffer the same fate of being "blacklisted," as Plaintiff and Julio Vera had been for expressing their views regarding the CBS Half-Pay Program.

d. Defendant WALTON told Plaintiff that Latinos can work for half the pay as compared to non-Hispanics, when the Plaintiff on or about November 22, 1993, complained to the WGA Executive Director, WALTON, and he told her that "Latinos can work for

half, because fifty-percent (50%) of something is better than One-hundred-percent (100%) of nothing," in utter disregard of the fact that Plaintiff previously been making "One-hundred-percent (100%)" of the Minimum Basic Agreement (MBA) on numerous projects.

e. In or about the beginning of August 1994, the Plaintiff contacted a producer at Defendant CBS in order to apply for either a staff writing assignment and/or special writing assignments. However, when the Plaintiff attempted to apply for these writing positions and writing assignments, she was told on or about August 12, 1994, by both this producer at CBS and the producer's assistant words to the effect "CBS wants nothing to do with you" and "You have been labeled a 'trouble-maker'."

f. Plaintiff has submitted sample screenplays/scripts to agents and producers, who have stated that the Plaintiff's screenplays/scripts are "excellent." However, on at least one occasion, CBS directed an independent production company to reject the Plaintiff's application for a particular writing assignment project. Up until said production company sought the approval of CBS, said production company expressed great interest in the Plaintiff's work; however, after contact with CBS, the production company ceased all contact with the Plaintiff.

44. Defendants' retaliatory actions against Plaintiff, as alleged above, constituted unlawful discrimination and retaliation employment on account of national origin and protected activities, in violation of *Title VII* and the *FEHA*, including *Government Code* §12940, and proximately caused the damage and injury to

Plaintiff set forth below.

WHEREFORE, Plaintiff requests relief as hereinafter provided.

DAMAGE ALLEGATIONS:

45. Plaintiff hereby incorporates by reference Paragraphs 1 through 44, and incorporates them as if fully set forth herein.

46. As a direct, foreseeable, and proximate result of the wrongful acts of Defendants described above, Plaintiff has suffered and will continue to suffer substantial losses in earnings, wages, salary, benefits, and additional amounts of money and other employment benefits, along with other incidental and consequential damages and losses, including the services of a psychologist, all in an amount to be proven at the time of trial. Plaintiff claims such amount as damages together with prejudgment interest.

47. As a further direct, foreseeable, and proximate result of said wrongful acts by Defendants, Plaintiff has suffered and will continue to suffer the intangible loss of such employment-related opportunities as the experience in the position sought by Plaintiff, all to Plaintiff's damage in an amount to be proven at the time of trial.

48. As a further direct, foreseeable, and proximate result of said wrongful acts by Defendants, Plaintiff has suffered and will continue to suffer humiliation, shame, despair, embarrassment, depression, discomfort, emotional distress and mental pain and anguish, all to

Plaintiff's damage in an amount to be proven at the time of trial.

49. As a further direct, foreseeable, and proximate result of said wrongful acts by Defendants, Plaintiff has suffered and will continue to suffer loss of reputation, goodwill and standing in the profession in which Plaintiff worked, thus precluding or diminishing Plaintiff's opportunity of employment in the profession in which she has worked, all to Plaintiff's damage in an amount to be proven at the time of trial.

50. The conduct of Defendants and their agents and employees as described herein was despicable, oppressive, fraudulent and malicious and done in conscious and reckless disregard of Plaintiff's rights, including under the *FEHA* and *Title VII*, and with a wrongful intention of hurting the Plaintiff. Plaintiff is thereby entitled to an award of punitive damages against Defendants in an amount appropriate to punish and make an example of Defendants and in an amount to conform to proof.

51. As a further direct, foreseeable, and proximate result of said wrongful acts by Defendants, Plaintiff has incurred attorney fees and costs in an amount to be determined, for which Plaintiff claims a sum to be established according to proof.

52. No adequate remedy exists at law for the injuries suffered by Plaintiff herein, insofar as the employment opportunity that Defendants have denied to Plaintiff cannot be secured absent injunctive relief. If this Court does not grant injunctive relief of the type and for the purpose specified below, Plaintiff will suffer

irreparable injury. Therefore, Plaintiff requests the following injunctive relief: that Defendants, their agents, successors, employees, and those acting in concert with them be enjoined permanently from engaging in each of the unlawful practices, policies, usages, and customs set forth herein, requiring Defendant CBS to hire Plaintiff for the employment position sought, that Defendant WGA be required to credit the membership status with writing credit to the Plaintiff and the members of the class whose employment as a writer was prevented by the discrimination, and to change such Hispanic WGA writers to a "current" membership status, and to enroll into membership those non-WGA members that would have been eligible for membership in the WGA had they not been prevented from being employed as a writer.

53. As a direct, foreseeable, and proximate result of Defendants', and each of their, discriminatory acts, each of the other class members and subclass members have suffered and continue to suffer damages similar to the damages suffered by the Plaintiff, entitling each of these other class members and subclass members to such damages, including, but not limited to, compensatory and punitive damages, in such amounts according to proof at the time of trial, and including, but not limited to, those damages listed in the Prayer for Damages below.

PRAYER FOR DAMAGES:

WHEREFORE, Plaintiff, for herself, and for the class and sub-class, prays for Judgment against Defendants, and each of them, as follows:

1. For a money Judgment representing compensatory damages, lost wages, back pay, front pay, earnings, retirement benefits, other employee benefits, and other monetary relief and all other sums of money, together with interest on those amounts, according to proof;

2. For a money Judgment for general damages, including for mental pain and anguish and emotional distress, according to proof;

3. For an award of punitive damages according to proof, in an amount appropriate to punish Defendants for their wrongful conduct and to set an example for others;

4. For costs of suit;

5. For prejudgment and post-judgment interest;

6. For permanent injunctive relief as specified in Paragraph 52, above.

7. For an award of reasonable attorney's fee and the costs and expenses of this action to Plaintiff and her counsel against the Defendants, and providing for interim payment in the case of an appeal of the Judgment by the Defendants including pursuant to *Government Code* Section 12965(b) and *Title VII.*

8. For costs of suit herein incurred;

9. That the Court retain jurisdiction until such time as it is satisfied that Defendants CBS and the

WGA have remedied the practices complained of and is determined to be in full compliance with the law; and,

10. For any other relief deemed just and proper;

DATED: June 20, 2001
MYER LAW FIRM

By:
SCOTT D. MYER
Attorney for Plaintiff,
MIGDIA CHINEA-VARELA, aka
MIGDIA C. VARELA

REQUEST/DEMAND FOR JURY TRIAL

Plaintiff hereby, on her own behalf, and for the class and sub-class, requests and demands a trial by jury of all issues.

DATED: June 20, 2001
MYER LAW FIRM

By:
SCOTT D. MYER
Attorney for Plaintiff,
MIGDIA CHINEA-VARELA, aka
MIGDIA C. VARELA

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.	AGENCY X EEOC	CHARGE NUMBER 3340941997
CA. Dept. Fair Employment & Housing and EEOC State or local Agency, if any		
NAME(Indicate Mr., Ms., Mrs.) Ms. Migdia C. Varela	HOME TELEPHONE (Include Area Code) (818) 956-0536	
STREET ADDRESS 1326 CORDOVA AVENUE CITY, STATE AND ZIP CODE GLENDALE, CA 91207		DATE OF BIRTH 08/05/XX
NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINS ME (If more than one list below.)		
NAME WRITERS GUILD OF AMERICA WEST, INC.	NUMBER OF EMPLOYEES, MEMBERS Cat D (501 +)	TELEPHONE (Include Area Code) (310) 550-1000
STREET ADDRESS 8955 BEVERLY BLVD. CITY, STATE AND ZIP CODE WEST HOLLYWOOD, CA 90048-2456		COUNTY 037

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))	DATE DISCRIMINATION TOOK PLACE
_X_ NATIONAL ORIGIN _X_ RETALIATION	EARLIEST 11/22/93 LATEST 11/22/93 _X_ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. a. Beginning from November 22, 1993 and continuing through the present, I have been denied equal wages while seeking employ with CBS in comparison with non-Hispanic writers represented by the Writers Guild of America

b. Beginning from November 22, 1993 and continuing through the present, I have been denied employment with potential employers in the entertainment industry.

II. Brian Walton, White, Executive Director of the Writers Guild of America West, told me that Latino's can work for half the amount compared with non-Hispanics.

III. I Believe that I have been discriminated against because of my national origin, Hispanic, and in retaliation for participating in a protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended.

IV. I also believe that Hispanics as a class have been adversely affected by allowing signatories to the

Minimum basic Agreement to hire professional writers for half the relevant minimum if they claim to be Hispanic.
I declare under penalty under perjury that the foregoing is true and correct 7/6/94 /s/ Date Charging Party (Signature)

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.	AGENCY X EEOC	CHARGE NUMBER 340951095
CA. Dept. Fair Employment & Housing and EEOC State or local Agency, if any		
NAME(Indicate Mr., Ms., Mrs.) Ms. Migdia C. Varela	HOME TELEPHONE (Include Area Code) (818) 956-0536	
STREET ADDRESS 1326 Cordova Avenue CITY, STATE AND ZIP CODE Glendale, CA 91207		DATE OF BIRTH 08/05/XX
NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINS ME (If more than one list below.)		
NAME Cbs	NUMBER OF EMPLOYEES, MEMBERS Cat D (501 +)	TELEPHONE (Include Area Code)
STREET ADDRESS 7800 Beverly Blvd. CITY, STATE AND ZIP CODE Los Angeles, CA 90036		COUNTY 037

CAUSE OF DISCRIMINATION BASED ON(Check appropriate box(es))	DATE DISCRIMINATION TOOK PLACE
_X_ NATIONAL ORIGIN	EARLIEST 06/13/95 LATEST 02/21/95 ___CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. Since August 12, 1994, I and others have been denied the opportunity to apply for a full time staff writers position at full pay with CBS .

II. I and other professional writers where required to participate in a trainee program which paid only 50% of what the full time position paid.

III. I believe I and others have been discriminated against in hiring on the basis of National Origin (Hispanic) in violation of Title VII of the Civil Rights Act of 1964, as amended.

I declare under penalty under perjury that the foregoing is true and correct

2/21/95 /s/

Date Charging Party (Signature)

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.	AGENCY X EEOC	CHARGE NUMBER 340951968
CA. Dept, Fair Employment & Housing and EEOC State or local Agency, if any		
NAME(Indicate Mr., Ms., Mrs.) Ms. Migdia C. Varela	HOME TELEPHONE (Include Area Code) (818) 956-0536	
STREET ADDRESS 1326 Cordova Avenue CITY, STATE AND ZIP CODE Glendale, CA 91207		DATE OF BIRTH 08/05/XX
NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINS ME (If more than one list below.)		
NAME Writers Guild of America West, Inc.	NUMBER OF EMPLOYEES, MEMBERS Cat D (501 +)	TELEPHONE (Include Area Code) (310) 550-1000
STREET ADDRESS 8955 Beverly Blvd. CITY, STATE AND ZIP CODE West Hollywood, CA 90048-2456		COUNTY 037

CAUSE OF DISCRIMINATION BASED ON(Check appropriate box(es)) _X_ RETALIATION	DATE DISCRIMINATION TOOK PLACE EARLIEST 06/13/95 LATEST 06/23/95 _X_ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I. Since 13 June 1995, I have been denied the opportunity to be considered for employment through the Writer's Guild of America, West, Inc.

II. The reason given for the denial was that the Guild had limited resources to correspond with me.

III. I believe that I have been retaliated against for filing a previous charge, 340941997, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I declare under penalty under perjury that the foregoing is true and correct

/s/ 6-23-95

Date Charging Party (Signature)

IRELL & MANELLA LLP
Henry Shields, Jr. (State Bar No. 62765)
Cathy A. Karlstad (State Bar No. 211362)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
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Kevin T. Baine, Esq. (D.C. Bar No. 238600)
725 Twelfth Street, N.W.
Washington, D.C. 2005
Telephone: (202) 434-5000

Attorneys for Defendant
CBS Broadcasting Inc.

Case No. CV 98-10064 JSL (AJWx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGDIA CHINEA-VARELA,
aka MIGDIA C. VARELA,
Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a California corporation; CBS BROADCASTING INC., a New York corporation, formerly known as CBS. INC.; WRITERS GUILD OF AMERICA, WEST INC., a California corporation; FRANK PIERSON, an individual; JEFF SAGANSKY,

an individual; CHARLES D. SEGARS, an individual; BRIAN WALTON, an individual; and DOES 1 through 10, inclusive,
Defendants.

Filed December 12, 2002
Entered December 17, 2002

JUDGMENT

Judge: Hon. J. Spencer Letts

On November 18, 2002, this action came before this District Court on Defendant CBS Broadcasting Inc.'s ("CBS") Motions for Summary Judgment. fn1 After reviewing and considering the papers submitted by the parties and a decision in favor of CBS having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is granted in favor of CBS in this action, that Plaintiff shall take nothing, that the entire action is dismissed on the merits, and that CBS shall recover its costs.

Dated: 12-12-02

The Honorable J. Spencer Letts
United States District Judge

Submitted by:

IRELL & MANELLA LLP
Henry Shields, Jr.
Cathy A. Karlstad

By:
Cathy A. Karlstad
Attorneys for Defendant
CBS Broadcasting Inc.

Footnotes

fn1 The Third Amended Complaint purports to sue two CBS entities. In addition to CBS Broadcasting Inc., it also names Columbia Broadcasting Systems, Inc., and entity that never actively conducted business and no longer exists. To the extent it is considered a party to this action, judgment is also granted in favor of Columbia Broadcasting Systems, Inc.

U.S. COURT OF APPEALS No. 03-55106
(Cross-Appeal No. 03-55225)
District Court Case No. CV-98-10064-JSL

Date of Panel Decision: June 25, 2004
Before: McKEOWN, BYBEE, Circuit Judges, and BREYER, District Judge

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGDIA CHINEA-VARELA,
aka MIGDIA C. VARELA,
Plaintiff/Appellant/Cross-Appellee,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a California corporation;
CBS BROADCASTING INC.,
a New York corporation,
formerly known as CBS INC.;
WRITERS GUILD OF AMERICA, WEST, INC., a California corporation;
FRANK PIERSON, an individual;
JEFF SAGANSKY, an individual;
CHARLES D. SEGARS, an individual;
BRIAN WALTON, an individual,
Defendants/Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES
HONORABLE J. SPENCER LETTS
(And Honorable Gary Allen Feess)

APPELLANT/CROSS-APPELLEE MIGDIA CHINEA-VARELA'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

MYER LAW FIRM
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Attorney for Plaintiff/Appellant/Cross-Appellee,
MIGDIA CHINEA-VARELA,
aka MIGDIA C. VARELA

Filed July 9, 2004

I. INTRODUCTION AND STATEMENT OF COUNSEL

Plaintiff-Appellant, MIGDIA CHINEA-VARELA, aka MIGDIA C. VARELA, is a Hispanic screenwriter, referred to herein as "Screenwriter." Appellees are CBS fn1, the WGA fn2 and four Individual Defendants fn3. This case arose out of CBS and WGA's program requiring Hispanic professional screenwriters to be paid *less than one-half* what non-Hispanic screenwriters were paid, and out of Screenwriter's complaints that the program was discriminatory against Hispanics.

Screenwriter seeks rehearing en banc of the June 25, 2004 Panel decision (McKeown, J., Bybee, J., and Breyer, District Judge sitting by designation). The Panel held that (1) screenwriter failed to plead a discrimination claim, (2) screenwriter failed to plead her retaliation claims other than two claims, which were then properly dismissed on summary judgment, (3) screenwriter failed to plead a harassment claim, and (4, 5 & 6) the District Court properly denied the screenwriter's motions to disqualify the District Judge (J. Spencer Letts), and to certify a class action for leave to amend. The Panel also declined to rule on an issue (7), that being administrative exhaustion.

Also, included in the first issue, above, is the issue of whether paying half the amount of union scale solely based upon the applicant being Hispanic is legal. Impliedly, the Panel concludes that such pay program is legal; Screenwriter suggests it is not, and that such an issue is a matter of exceptional importance that needs to be directly addressed.

Screenwriter seeks rehearing en banc, including on the first issue identified above, and a portion of the second as well. With regard to this first issue and the portion of the second issue, in the judgment of counsel, the Panel utilized the wrong legal standard in upholding the District Court, when the Panel treated these issues as having been dismissed at trial or summary judgment, when in fact they were dismissed at the pleading stage. This improper standard used by the Panel is apparently based "A material point of fact or law overlooked in the decision," by the Panel, and constitutes one ground for this Petition for Rehearing. [*FRAP* 40]. In doing so, this also creates "An apparent conflict with another decision of the Court which was not addressed in the opinion," and also constitutes another ground for this Petition for Rehearing. [*FRAP* 40]. See *Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992, and *Ortez v. Washington County, State of Oregon* (9th Cir. 1996) 88 F.3d 804, which standards for pleading discrimination claims contradicts those evidentiary standards for the order of proof in *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 2001) 275 F.3d 797, 800-02, and *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30* (9th Cir. 1982) 694 F.2d 531, 537-38, improperly used by the Panel for this pleading sufficiency determination.

Further, in the judgment of counsel, unless the Panel corrects this error, rehearing en banc is required because the Panel's Decision overlooks established law on the standards for pleading a discrimination claim, and directly conflicts with decisions of this Court and the Untied States Supreme Court on issues of exceptional importance. The Panel's Decision impairs the effectiveness of *Title VII* in remedying

discrimination in the workplace by its utilizing the standards for proof at trial, on a pleading issue. Further, the Panel's Decision contravenes the well-settled principles of pleading discrimination claims, and requires a level of proof at the time of pleading that is clearly not required by either the Ninth Circuit or United States Supreme Court law. See *Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992, and *Ortez v. Washington County, State of Oregon* (9th Cir. 1996) 88 F.3d 804. Because the Panel's Decision conflicts with these decisions, en banc consideration is "necessary to secure or maintain uniformity" of the Court's decisions, and is one ground for suggesting en banc consideration. Further, another grounds for suggesting en banc review is that the determination of pleading standards for *Title VII* discrimination cases is "a question of exceptional importance," in that removing the vestiges of discrimination is an important objective of national importance. Further, another ground for suggesting en banc review is that the "opinion directly conflicts with an existing opinion by another court" [*Sparrow v. United Air Lines, Inc.* (DC Cir. 2000) 216 F.3d 1111, 1114], and "substantially affects of rule of National application in which there is an overriding need for National uniformity," in that another case that it directly conflicts with is a U.S. Supreme Court case, [*Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992].

Also, the Panel ruled on the fourth, fifth and sixth issues without any explanation or authority whatsoever. Finally, the Panel declined to rule on administrative exhaustion issues. Therefore, screenwriter also now asks these issues that were determined without citation to authority be decided by

the Panel, and to the extent necessary for a full resolution of this appeal, the administrative exhaustion issues, in that these issues appear to have been "material points of fact or law overlooked in the decision."

II. PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

A. Background of Case and the Allegations of Discrimination.

Appellant is a screenwriter. CBS does not have a formal application process for writers. [Third Amended Complaint ("TAC"), page 9, ¶25, lines 12-17; Excerpts of Record ("ER"), p. 271]. Prior to Half-Pay Program, Screenwriter, and certain other experienced Hispanic writers, managed to pitch their stories directly to various studios. [TAC, page 9, ¶26, lines 18-26; ER, p. 271]. After program started, if Screenwriter and other Hispanic professional writers wished to seek staff-writing assignment or special-writing project, they were required to apply through and participate in this Half-Pay Program, which paid less than 50% of what full time positions paid to non-Hispanic professional writers. [TAC, ¶27, page 9, line 27-page 10, line 8, ER, p. 271-272].

On December 15, 1998, Screenwriter filed her initial Court Complaint for National Origin Discrimination and Retaliation. [ER, p. 1-72]. On June 20, 2001, after a prior appeal and partial reversal, Screenwriter filed her TAC, which included two causes of action: 1) National origin discrimination and harassment under *Title VII* and the *FEHA* against

both CBS and the WGA, and 2) Retaliation under the *FEHA* against all defendants, including the individual defendants, and under *Title VII* against CBS and the WGA. [ER, p. 263-293].

Appellees filed Motions to Dismiss. On November 5, 2001, the District Court dismissed the Complaint except as to those allegations related to ¶¶43(e) and 43(f) relating to two retaliation claims. Leave to amend was not granted as to the remainder. [ER, p. 848]. On September 17, 2002, CBS filed a Motion to Dismiss or for Judgment on the Pleadings. [ER, p. 865-940]. On October 2, 2002, the District Court ordered that CBS's Motion be treated as a Motion for Summary Judgment. [ER, p. 993-994]. The Summary Judgment was granted in part. [ER, p. 1367-1368]. On December 17, 2002, final Judgment was entered. [ER, p. 1387-1388]. Screenwriter timely filed this appeal within 30-days on January 16, 2003, which appeal includes the November 5, 2001 dismissal of the discrimination claims. [ER, p. 1389-1440].

Title VII prohibits covered entities from discriminating against a protected individual because of her race, color, religion, sex or national origin. [42 *USC* §2000e-2(a)-(d)]. Likewise, the *FEHA* prohibits an employer from taking any adverse action against a protected individual based upon these factors, as well as certain additional factors, including "ancestry." [See *California Gov. Code* §§12926(j), 12940(a), 12941, 12943, 12945; see also 2 Cal.C.Regs. §7285 et seq.] Screenwriter's national origin of Hispanic is clearly a protected category under both statutes. Screenwriter is of "Hispanic national origin." [TAC, page 5, ¶8, lines

10-11, ER, p. 267]. This constitutes Screenwriter's membership in a protected class.

The following conduct relating to the terms and conditions of employment are unlawful: failing or refusing to hire, failing or refusing to refer for employment; discharging; or "*otherwise discriminating* with respect to compensation, terms, conditions, or privileges of employment." [42 *USC* §2000e-2(a)(1)]. In a similar manner, the following actions, if taken because of a protected characteristic, will constitute an unlawful employment practice: refusing to hire or employ; refusing to select for a training program leading to employment; discharging from employment or from a training program leading toe employment; *discriminating in compensation or terms, conditions or privileges of employment.* [*California Gov. Code* §12940(a)].

The primary allegations related to the half-pay program in the Third Amended Complaint is contained in paragraph 33, including subparagraph 33.a., [ER, p. 275], which states that:

> "33. Plaintiff sought out and applied for writing assignments, both staff writing positions as well as for special writing assignments, with Defendant CBS, at all times relevant to this Complaint, including, but not limited to the following:
>
> A."On or about June 18, 1993, through and including December 1993, Plaintiff applied for both staff writing positions as well as for special writing assignments with

Defendant CBS, but the Defendant CBS did not act on said applications until on or about November 22, 1993, at which time the Defendant CBS refused to hire Plaintiff at the full salary and benefits, but instead, on or about November 22, 1993, steered and channeled Plaintiff's application into the Hispanic Half-Pay Program, and offered the Plaintiff a writing position paying approximately one-half the union wage scale, based solely on the fact that the Plaintiff was a Hispanic. Plaintiff continued to contact the Defendant CBS through on or about December 1993, and beyond, in furtherance of her applications for a staff writing position and special writing assignments. Based in part on this incident, the Plaintiff filed her First Charge."

Further, paragraph 15, states:

"Plaintiff is informed and believes and based on such information and belief, Plaintiff alleges that Hispanics as a class have been adversely affected by the Half Pay Program by allowing signatories to the MBA to hire professional writers for half the relevant minimum if they claim to be Hispanic, herein referred to as the "Half-Pay Program." Whether by intent, design or practice, even if the Half-Pay Program was originally conceived only for inexperienced non-members of the WGA,

> in practice, operation and application the Half-Pay Program forced all, or nearly all, Hispanics, including the Plaintiff, to either apply through or have their applications channeled through the Half-Pay Program. Said discrimination was largely carried out by the WGA and CBS referring and channeling anyone with a Hispanic surname, such as the Plaintiff's surname "Varela," to have their application considered through said Half-Pay Program. All, or most, Hispanic writers were no longer permitted by the WGA and CBS to apply through the normal channels of application."

It is clear that based upon these allegations, as well as the complementary allegations contained in paragraphs 26, 27, 35, 36 and 37, among others, that Screenwriter has properly plead a case of discrimination based upon this half-pay for Hispanics program, and suffered discrimination in terms of employment.

Additionally, both *Title VII* and the *FEHA* prohibit actions taken in retaliation for activity protected under the respective statutes. [See 42 *USC* §2000e-3(a); *California Gov. Code* §12940(h)]. Screenwriter has alleged "Retaliation" against CBS, including in paragraphs 43(e) and 43(f). [ER, p. 284].

In general, plaintiffs may attempt to prove the connection between an adverse action and their protected characteristic through one of two theories: disparate treatment or disparate impact. "Disparate

treatment" is *intentional* discrimination against one or more persons on prohibited grounds; i.e., treating similarly situated individuals differently in their employment *because of* a protected characteristic. [*International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854, fn. 15; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 355, 100 Cal.Rptr.2d 352, 378, fn. 20]. There are two different methods of proving intentional discrimination: direct evidence; and indirect or circumstantial evidence, invoking the *McDonnell Douglas* analysis. "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." [*Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 Fed.3d 1217, 1221 (brackets in original; internal quotes omitted)]. In most cases, there is no direct evidence of discrimination by the employer; therefore, discrimination claims must be proved indirectly, i.e., circumstantially. To this end, discrimination claims *at trial* are analyzed under an allocation of the burdens of production and proof that subjects such claims to an increasing narrow focus. *At trial*, first, plaintiff must establish a *prima facie case* of discrimination; the burden of production then shifts to the employer to respond with a *legitimate, nondiscriminatory reason* for its actions; and, then, the burden shifts back to plaintiff to establish that the employer's articulated reason was a "pretext" or cover-up for unlawful discrimination. [*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-1825].

Additionally, *Title VII* violations may also be proved by the "disparate impact" theory; i.e., that regardless of motive, a *facially neutral* employer

practice or policy, bearing no relationship to job requirements, in fact had a disproportionate adverse impact on members of a protected class. [*International Brotherhood of Teamsters*, supra; *Guz*, supra].

B. The Panel Decision In This Case Improperly Uses an Evidentiary Standard to Judge the Sufficiency of the Discrimination Claim Pleading, and Overlooks the Liberal Pleading Standards, Including Relevant U.S. Supreme Court and 9th Circuit Authority, With Respect to the Discrimination Claim and Instead Improperly Places An Unduly High Burden on the Plaintiff at the Pleading Stage to Prove Her Case.

The Ninth Circuit's panel Decision in this matter, with regard to the discrimination claim stated its decision in one single paragraph, at page 3, first full paragraph:

> "Varela alleged that an affirmative action trainee program that WGA negotiated and that CBS executed from 1993 to 1995 discriminated against Hispanic writers on the basis of their national origin. We agree with the district court that Varela entirely failed to demonstrate how the program had a disparate impact on Hispanic scriptwriters, or how it resulted in Varela's being discriminated against in consideration for regular staff writing positions at CBS. *See Atonio v. Wards Cove Packing Co., Inc.*, 275 F.3d 797, 800-02 (9th Cir. 2001); *Gay v. Waiters' and*

Daily Lunchmen's Union, Local No. 30, 694 F.12d 531, 537-38 (9th Cir. 1982)."

Both of these citations are not proper authority for the discrimination claims because Screenwriter's claims were dismissed on a pleading motion to dismiss, not at the time of the summary judgment motion. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 2001) 275 F.3d 797, 800-02, (disparate impact case), does not apply the proper standards for pleading a case. *Atonio* was based upon a bench trial. Note that in *Atonio*, the Court states that "It is the district court's determination on those issues, based on the record made at the bench trial, that we now review." Likewise, with regard to *Gay v. Waiters' and Daily Lunchmen's Union, Local No. 30* (9th Cir. 1982) 694 F.12d 531, 537-38, this was based upon a review of evidence at trial. Note that *Gay*, 694 F.2d at 534, refers to "The remaining claims were tried before the district court in October of 1979," and at 536, refers to the fact that "The waiters appeal the district court's judgment only with respect to their claims arising under 42 U.S.C. § 1981," i.e., the "remaining claims." Not only is the *Gay* Court not ruling on a *Title VII* claim, but instead a §1981 claim, this claim was determined at trial, too. Therefore, neither *Atonio* nor *Gay* are authority for the standards of pleading a claim in a Complaint, in that they both involve claims that proceeded to trial.

However, the rules governing pleading employment claims in federal courts are the same as in civil actions generally. [See *Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992, 997 ("the ordinary rules for assessing the sufficiency of a

complaint apply")]. The basic requirement is only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, to survive a *FRCP* 12(b)(6) motion, a *Title VII* plaintiff *need not* allege every element of a *prima facie* case of discrimination. The complaint need only set forth facts sufficient to *put defendants on notice* of the nature of the claims against them. These simplified notice pleading standards rely on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. [FRCP 8(c); *Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992, 998].

In this regard, a race discrimination plaintiff need not set forth the elements of a *prima facie* case at the pleading stage. Thus, "I was turned down for a job because of my race" was held to be a sufficient statement of a claim upon which relief may be granted. [*Sparrow v. United Air Lines, Inc.* (DC Cir. 2000) 216 F.3d 1111, 1114]. Also, with respect to national origin discrimination claims, allegations that the employee is of one national origin (e.g., Hungarian), and that others at his place of employment are of another national origin (e.g., French), and that he was terminated because of his national origin stated a claim for national origin discrimination in violation of *Title VII.* [*Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S.Ct. 992, 999] Similarly, with respect to ethnic origin discrimination, allegations that an employer required an employee, because of his national origin (e.g., Mexican-American origin), to comply with different terms and conditions of employment than it required of those of other national origins (e.g., non-Mexican-American co-workers), was held an adequate statement

of a *Title VII* disparate treatment claim. [*Ortez v. Washington County, State of Oregon* (9th Cir. 1996) 88 F.3d 804, 808].

These three cases, i.e., *Sparrow, Swierkiewicz* and *Ortez*, one of which is an Ninth Circuit case and another one is a U.S. Supreme Court case, clearly show that the allegations of discrimination in this case were sufficient and the Court's dismissal of them on the motion to dismiss to be erroneous.

As such, the panel's decision in this case, utilizing the cases of *Atonio* and *Gay*, creates not only a conflict between two Ninth Circuit cases, but also conflicts with the controlling U.S. Supreme Court authority.

Screenwriter respectfully requests rehearing of these issues, and/or rehearing en banc, as appropriate.

C. The Half-Pay for Hispanics Program was Discriminatory and Was Not a Lawful Affirmative Action Program.

To the extent that the Court continues to hold that the Plaintiff has not properly plead a discrimination claim, then the further issue of whether the Half-Pay for Hispanics Program was discriminatory is also an issue.

Paying Hispanics half the amount paid to non-Hispanics, solely based upon the fact that they are Hispanic, amounts to discrimination. Defendants attempt to now label such a program as an affirmative action program should be of no import. While bona fide affirmative action plans may in certain contexts be

allowed under Civil Rights laws, merely calling a program affirmative action does not make it a bona fide affirmative action program, as here, where the program is blatantly discriminatory on its face against those it purports to benefit and has an adverse impact on the protected class that it is allegedly created to benefit. *United Steelworkers v. Weber* (1979) 443 U.S. 193, 204, 99 S. Ct. 2721, 61 L.Ed.2d 480, emphasis added, held:

> "Title VII's prohibition in §§703(a) and (d) against racial discrimination does not condemn *all* private, voluntary, race-conscious affirmative action plans. . . We need not today define in detail the line of demarcation between permissible *and impermissible affirmative action plans.* It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. . . [footnote 8] This is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII."

This suggests some purported "affirmative action" plans would violate *Title VII.* Merely calling a program "affirmative action" does not make it immune from Constitutional and *Title VII* Civil Rights protections. As set forth above, Screenwriter alleged she was restricted from applying for a writing assignment outside the program, that she *did attempt* to apply for writing assignments through the normal channels but was not accepted by the WGA nor CBS

and that she was *required* to go through the half-pay program. Paying half the amount for an employee without lawful reason is discrimination even if Defendants contend it to be an affirmative action program.

Screenwriter respectfully requests rehearing on whether Half-Pay for Hispanic Screenwriters was discriminatory, and/or rehearing en banc, as appropriate

D. Other Issues, Including Exhaustion of Administrative Remedies.

To the extent necessary, Screenwriter seeks rehearing of the issues that the Panel did not reach or did not address, including administrative exhaustion, to the extent necessary, for a full rehearing of this matter.

Contrary to the CBS Appellees' arguments, the main Charge against CBS regarding the Half-Pay Discrimination Program is the "First Charge," i.e., that Charge filed on or about July 6, 1994, and attached to the Third Amended Complaint as Exhibit "A." [ER 289]. This is the Charge that is relevant to the discriminatory Half-Pay Program. [See Third Amended Complaint, ¶33.a., at ER 275].

A lawsuit is not limited to those facts in the charge. *Oubichon v. Northern Am. Rockwell Corp.* (9th Cir. 1973) 482 F.2d. 569, 571; *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1121 (adopting standard for *FEHA* claims). "[P]ermissible scope of the civil action [is the same as] the scope of the EEOC investigation which can reasonably be expected to grow out of the

charge of discrimination." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust* (9th Cir. 1984) 732 F.2d 726, 730. [TAC, pages 10-11, ¶30]. Each of Screenwriter's claims are reasonably related to and within the scope of both the First Charge [Exhibit "A" to TAC; ER, p. 289], as well as being the type of information that would be usually encompassed and within the scope of an EEOC investigation.

CBS is listed within the caption or the body of the original July 6, 1994 EEOC Charge, i.e., the First Charge. In this regard while WGA was listed as the "main" party being charged, CBS is below as additional party who had discriminated against Screenwriter. CBS is clearly within "scope" of the original July 6, 1994 EEOC Charge, i.e., the First Charge, and deemed to have been satisfied within the EEOC's administrative remedies satisfaction requirement. Screenwriter should be deemed to have exhausted her administrative remedies as to CBS in light of the fact that CBS was included within the scope of the EEOC's investigation. [TAC, ¶30].

In *Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1352, stated, citing *Chung v. Pomona Valley Community Hospital* (9th Cir. 1982) 667 F.2d 788, 792, that "Title VII charges can be brought against persons not named in an E.E.O.C. complaint as long as they were involved in the acts giving rise to the E.E.O.C. claims." Just as in both *Wrighten* and *Chung*, the additional parties, each had participated in the acts leading to the administrative charges. Further, in *Martin v. Fisher* (1992) 11 Cal. App. 4th 118, 119-123, the Court held that as to a defendant, a plaintiff had exhausted his administrative

remedies and could therefore sue such defendant who had named such defendant in the body of the Plaintiff-Appellant's DFEH Charge, but not in the caption of the document, nor in the Right-To-Sue Letter. See also *Saavedra v. Orange County Consolidated Transportation etc. Agency* (1992) 11 Cal. App. 4th 824, 826-828, holding that a defendant not delineated as the offending party, but described in the body of the administrative charge was properly the subject of a civil lawsuit. See also *Cole v. Antelope Valley Union High School District* (1996) 47 Cal.App.4th 1505, which held that Defendants that had been named in the caption or body of the DFEH Charge were allowed to bring a civil lawsuit under the FEHA

Screenwriter respectfully requests rehearing of the issues identified above, and/or rehearing en banc, as appropriate.

III. CONCLUSION

For the foregoing reasons, Screenwriter respectfully requests rehearing of the issues identified above, and/or rehearing en banc, as appropriate, for reasons set out in the statement of counsel, above.

DATED: July 9, 2004
MYER LAW FIRM
By:
SCOTT D. MYER, ESQ.,
Plaintiff-Appellant,
MIGDIA CHINEA-VARELA, aka
MIGDIA C. VARELA

Footnotes

fn1 COLUMBIA BROADCASTING SYSTEM, INC., a California corporation, and CBS BROADCASTING INC., a New York corporation, formerly known as CBS INC.

fn2 WRITERS GUILD OF AMERICA, WEST, INC., a California corporation.

fn3 FRANK PIERSON, JEFF SAGANSKY, CHARLES D. SEGARS and BRIAN WALTON.

California Government Code §12926

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

. . .

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows: "Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

. . .

(g) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

. . .

(j) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability,

medical condition, marital status, sex, age, or sexual orientation.

. . .

(m) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

. . .

(r) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

. . .

California Government Code §12940

12940. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from

employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

. . .

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national

origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or any intent to make any such limitation, specification or discrimination. Nothing in this part prohibits an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, where the law compels or provides for that action.

. . .

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish

harassment. (2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment. (3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action. (4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

. . .

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

. . .

U.S. Code (01/05/99) 42 U.S.C. Section 2000e. Definitions

For the purposes of this subchapter

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts,

unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association,or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board,

or joint council so engaged which is subordinate to a national or international labor organization

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 et seq.);

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national

or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 et seq.), and further includes any governmental industry, business, or activity.

. . .

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter. (m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

U.S. Code (01/05/99) 42 U.S.C. Section 2000e-2. Unlawful employment practices

(a) Employer practices It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any

individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

. . .

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or

national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

. . .

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that

causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

. . .

(l) Prohibition of discriminatory use of test scores It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

. . .